



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

THE HISTORY OF THE

1

2

3

4

5

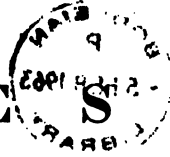
X
U.S.A.
N.Y.100

J20





REPORTS
OF
C A S E S



ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature,

AND IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

THE CORRECTION OF ERRORS,

IN THE

STATE OF NEW-YORK

BY WILLIAM JOHNSON,

COUNSELLOR AT LAW.

VOL. III.

Third Edition, with additional Notes and References.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY.
1860.



JUDGES
OF
THE SUPREME COURT OF JUDICATURE
OF
THE STATE OF NEW-YORK,
DURING THE TIME OF
THE THIRD VOLUME OF THESE REPORTS.

JAMES KENT, Esq., *Chief Justice.*
SMITH THOMPSON, Esq.
AMBROSE SPENCER, Esq.
WILLIAM W. VAN NESS, Esq.
JOSEPH C. YATES, Esq. (*Appointed Feb. 8, 1808.*)

MATTHIAS B. HILDRETH, Esq., *Attorney-General.*

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the tenth day of January, in the thirty-third year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, Counsellor at Law, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit :

" Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. III."

In conformity to the act of the Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefit thereof to the arts of designing, engraving, and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THE THIRD VOLUME.

The letter *v.* follows the name of the plaintiff.

A.		Bouton <i>v.</i> Neilson,.....	474
		Boyer, Devoy <i>v.</i>	247
		Briggs <i>v.</i> Briggs,.....	258. 449
ABEEL, Baron <i>v.</i>	481	Brink, Sears <i>v.</i>	210
Alexander, Jackson, <i>ex dem.</i> Hud-		Brown <i>v.</i> Clark,.....	443
son and Chapman, <i>v.</i>	484	Brower <i>v.</i> Jones,.....	230
Allison <i>v.</i> Matthieu,.....	235	Brownel, Jackson, <i>ex dem.</i> Col-	
		den, <i>v.</i>	140
		——— <i>v.</i> Slocum,.....	430
		Brown, Powell <i>v.</i>	100
		———, Jackson, <i>ex dem.</i> Antell and	
		Wife, <i>v.</i>	459
		Bruce <i>v.</i> Pearson,.....	534
		Brush <i>v.</i> Administrators of Reeves,	439
		Bryden, Fink <i>v.</i>	244
		———, Fink, jun. <i>v.</i>	245
		Bunn <i>v.</i> Hoyt,.....	255
		Bush, Jackson, <i>ex dem.</i> Heet and	
		Gourley, <i>v.</i>	512
B.		C	
Bailey and Bogert <i>v.</i> Ogden,.....	399	Caldwell, Bailey and Voorhees <i>v.</i>	451
Bailey and Voorhees <i>v.</i> Caldwell,..	451	Camp and Townley, Tertenants of	
Bankcraft, Jackson, <i>ex dem.</i> Ai-		Crosby, Whitney <i>v.</i>	86
kins, <i>v.</i>	259	Carmer <i>v.</i> Weeks and Thompson,	246
Barker, M'Collum <i>v.</i>	153		
Barker, Howes <i>v.</i>	506		
Barlow <i>v.</i> Todd,.....	367		
Baron <i>v.</i> Abeel,.....	481		
Bennett and Wife <i>v.</i> Irwin,.....	363		
——— <i>v.</i> Hurd,.....	438		
Bethune and Boorman, Robertson <i>v.</i>	342		
Biays <i>v.</i> Merrihew,.....	251		
Blagge, Philips <i>v.</i>	141		
Blanshan, Jackson, <i>ex dem.</i> Bur-			
hans, <i>v.</i>	292		
Boot and Bentley <i>v.</i> Franklin,....	207		

TABLE OF THE CASES.

Carpenter, Dumond's Administrators v.	183
——, Dumond v.	141
Carver v. Tracy,	427
Center, Ward v.	271
Charles v. Stansbury,	261
Chase, Gale v.	147
Cheetham v. Lewis,	42
——, Tillotson v.	56. 95
Clark v. Holmes,	149
——, Brown v.	443
——, Jackson, <i>ex dem.</i> Green, v.	424
Clinton v. Elmendorf,	143
—— v. Mitchell,	144
Close v. Gillespey,	526
Coddington, Dodge v.	147
Columbian Insurance Company, Livingston v.	49
Colvin, Foot and Litchfield v.	216
Commercial Insurance Company, Reade and Jephson, v.	352
Cooper v. Heermance,	315
Corp v. Vermilye,	145
Crookshanks, Todd v.	432
Cropsey, Cruger v.	242
Cruger v. Cropsey,	<i>ib.</i>
——, Rogers v.	564
Currie and Whitney v. Henry,	140
Cutting, People v.	1

D.

Davis, Lewis v.	17
Davis v. Grainger,	259
Deas v. Thorn,	543
De Fonclear v. Shottenkirk,	170
Delafield v. Hand,	310
Devoy v. Boyer,	247
Deyo, Jackson, <i>ex dem.</i> Whitebeck, v.	422
Dieffendorf and Zoller, Jackson, <i>ex dem.</i> Wright, v.	269
Dillenback, Jackson, <i>ex dem.</i> Casselman, v.	12
Dobbin, Jackson, <i>ex dem.</i> Sagoharie, v.	223
Dodge v. Coddington,	147
——, Kent v.	447
Donelly v. Vandenberg,	27
Dubois v. Roosa,	145
Duell, People v.	449

Dumond v. Carpenter,	14
——, Administrators of, v. Carpenter	183
Dunnett v. Tomhagen,	154
Duykinck, Watson v.	335

E.

Elder, Smith v.	105
Elmendorf, Clinton v.	143
——, Smedes' Executors v.	185

F.

Falls v. Stickney,	541
Farquharson v. Mabee,	553
Fenner, Wilson v.	439
Ferrers, M'Menomy and Townsend v.	71
Fink v. Bryden,	244
——, jun. v. Bryden,	245
Fitch, Hewitt v.	250
Fleming v. Gilbert,	528
Foot and Litchfield v. Colvin and others,	216
Fox and Payne v. Reil,	477
Franklin, Boot and Bentley v.	207
——, Mason and Smedes v.	202

G.

Gale v. Chase,	147
Gardner, M'Kerras v.	137
Gaylord's Administrators, Parsons v.	463
Gilbert, Fleming v.	528
Gillespey, Close v.	526
Goodenow v. Travis,	427
Grainger, Davis v.	259
Griswold v. The New-York Insurance Company,	321

H.

Hackley v. Hastie and Patrick, 232.	253
—— v. Patrick,	536

TABLE OF THE CASES.

5

Hall, Ous v.....	451	Jackson, <i>ex dem.</i> Ludlow, v. Myers,	388. 541
Hallet v. Wylie.....	74	_____ Ostrander, v. Has-	
Hand, Delafield v.....	310	brouck,	331
Harris v. Wadsworth.....	257	_____ Reiley and others,	
Hartshorne and others v. Slegt,	554	v. Livingston,	455
Hasbrouck, Jackson, <i>ex dem.</i> Os-		_____ Sagoharie, v. Dob-	
trander, v.....	331	bin,	223
_____, Montgomery v.....	538	_____ Schuyler, v. Vedder,	8
Hastie and Patrick, Hackley v. 232.	253	_____ Trustees of New-	
Hatheway, Jarvis v.....	180	burgh, v. Nestles,	113
Hewitt v. Fitch,	250	_____ Vandeuzen, v. Scis-	
Hill, Phoenix v.....	249	sam,	499
Holmes, Clark v.....	149	_____ Waldron, v. Wel-	
_____, Sergeant v.....	428	den,	283
Hooker, Pierson v.....	48	_____ Whitbeck and Gar-	
Howes v. Barker,	506	dinier, v. Deyo,	422
Howland v. Ralph,	20	_____ Williams, v. Stokes	
Hoyt, Bunn v.....	255	and Thompson,	151
_____ v. Wildfire,	518	_____ Wright, v. Dieffen-	
Heermance, Cooper v.....	315	dorf and Zoller,	269
Hill, Walsh v.....	446	Jadwin and others, Pell v.....	448
Hubbell and Root, Young v.....	430	Jarvis v. Hatheway,	180
Hudson, Jackson, <i>ex dem.</i> Klock, v.	375	Ingersoll v. Wilson,	437
Hunt v. Onderdonk,	149	Johnston v. Robins,	440
Huntington, Trustees of, v. Nicoll,	566	Jones, Brower v.....	230
Hurd, Bennet v.....	438	Jones v. Willson,	434
Hyatt v. Wood,	239	Irwin, Bennett v.....	363

I & J.

Jacobson v. Executors of Le Grange,	199
Jackson, <i>ex dem.</i> Aikins and others,	
v. Bankcraft,	259
_____ Antell and Wife, v.	
Brown,	459
_____ Burhans, v. Blan-	
shan,	292
_____ Casselman, v. Dil-	
lenback,	12
_____ Colden, v. Brownel,	140
_____ Donnally, v. Walsh,	226
_____ Dunbar, v. Todd,	300
_____ Green, v. Clark, ..	424
_____ Heet and Gourley,	
v. Bush,	512
_____ Hornbeck and oth-	
ers, v. Seaman,	495
_____ Hudson and Chap-	
man, v. Alexander,	484
_____ Kenyon, v. Virgil,	540
_____ Klock, v. Hudson,	375
_____ Law, v. Virgil,	133

K.

Keeler, Ruggles v.....	263
Kent v. Dodge,	447
Kidder v. Townsend,	435
King v. Shaw,	142
Kleecke v. Styles,	250

L.

Lammond, Reynolds v.....	445. 540
Larmouth, Wilson v.....	433
Lawrence and Doe, Pearsall v....	514
Lee, Townsend v.....	435
Le Grange's Executors, Jacobson v.	199
Lewis, Cheetham v.....	42
Lewis v. Davis,	17
Lewis, Smith v.....	157
Littlefield v. Storey,	425
Livingston v. The Columbian In-	
surance Company,	49
_____ v. Executors of Living-	
ston.	189. 254

Livingston, Jackson, <i>ex dem.</i> Reiley and others, <i>v.</i>	455	Ogden, Bailey and Bogert <i>v.</i>	391
Lothrop, Nicholson <i>v.</i>	139	Ogilvie, Varian <i>v.</i>	451
Lovejoy, Wilson <i>v.</i>	448	Onderdonk, Hunt <i>v.</i>	141
Luther, Potter <i>v.</i>	431	Otis <i>v.</i> Hall,.....	451
		Overseers of the Poor of Clinton, Sweet <i>v.</i>	21

M.

Mabee, Farquharson <i>v.</i>	553
Main <i>v.</i> Newson,.....	542
Markle, Read <i>v.</i>	523
Marine Insurance Company, Richards <i>v.</i>	307
Mason and Smedes <i>v.</i> Franklin,...	202
Matthieu, Allison <i>v.</i>	235
Mercer <i>v.</i> Sayre and Toler,.....	248
Merrihew, Biays <i>v.</i>	251
M'Carty, Waldron <i>v.</i>	471
M'Carty <i>v.</i> Sherman,.....	429
M'Clean <i>v.</i> Rankin and Heyer,...	369
M'Collum <i>v.</i> Barker,.....	153
M'Instry <i>v.</i> Pearsall,.....	436
M'Intyre <i>v.</i> Rowan,.....	144
M'Kerras <i>v.</i> Gardner,.....	137
M'Menomy and Townsend <i>v.</i> Ferrers,.....	71
M'Neal <i>v.</i> Scoffield,.....	436
Moffatt, Rob and Neilson <i>v.</i>	257
Minturn and Champlin <i>v.</i> Phelps,...	446
Mitchell, Clinton <i>v.</i>	144
Meyers, Jackson, <i>ex dem.</i> Ludlow, <i>v.</i>	388
Montgomery <i>v.</i> Hasbrouck,.....	538

N.

Neilson, Bouton <i>v.</i>	474
Nestles, Jackson, <i>ex dem.</i> Trustees of Newburgh, <i>v.</i>	113
New-York Insurance Company, Speyer <i>v.</i>	88
Griswold <i>v.</i>	321
Newson, Main <i>v.</i>	542
Nicholson <i>v.</i> Lothrop,.....	139
Nicoll, Trustees of Huntington <i>v.</i> ...	566

O.

Oakley <i>v.</i> Steddiford and Marshchalk,	253
---	-----

York, Wynkoop <i>v.</i>	11
Washingtongton <i>v.</i> Overseers of Stanford,	191

P.

Parker, Thompson and Coles <i>v.</i> ...	261
Parsons <i>v.</i> Administrators of Gaylord,.....	461
Patrick, Hackley <i>v.</i>	531
Pearsall <i>v.</i> Lawrence,.....	511
——— M'Instry <i>v.</i>	311
Pearson, Bruce <i>v.</i>	531
Pell <i>v.</i> Jadwin and others,.....	441
People <i>v.</i> Cutting,	511
——— <i>v.</i> Pettit,.....	511
——— <i>v.</i> Duell,.....	441
Pettit, People <i>v.</i>	511
Phoenix <i>v.</i> Hill,.....	241
Phelps, Minturn and Champlin <i>v.</i> ...	311
Philips <i>v.</i> Blagge,.....	141
Pierson <i>v.</i> Hooker,.....	41
Potter <i>v.</i> Luther,.....	431
Powell <i>v.</i> Browne,.....	101
Preston, Tillotson <i>v.</i>	221

Q.

Quin <i>v.</i> Riley,.....	241
----------------------------	-----

R.

Ralph, Howland <i>v.</i>	21
Rankin and Heyer, M'Clean <i>v.</i> ...	361
Read and Jephson <i>v.</i> The Commercial Insurance Company,	351
Read <i>v.</i> Markle,.....	521
Reed, Wilson and Gibbs <i>v.</i>	171
Reeve's Administrators, Brush <i>v.</i> ...	431
Reil, Fox and Payne <i>v.</i>	471
Reynolds <i>v.</i> Lammond,.....	445
Richards <i>v.</i> The Marine Insurance Company,	301
Riley, Quin <i>v.</i>	241

TABLE OF THE CASES.

7

Robb and Neilson <i>v.</i> Moffat,.....	257	Todd, Jackson, <i>ex dem.</i> Dunbar, <i>v.</i>	300
Robins, Johnston <i>v.</i>	440	—— <i>v.</i> Crookshanks,.....	432
Rogers <i>v.</i> Cruger,.....	564	Tomhagen, Dunnett <i>v.</i>	154
Roosa, Dubois <i>v.</i>	145	Townsend, Kidder <i>v.</i>	435
Robertson <i>v.</i> Bethune and Boor-		Townsend <i>v.</i> Lee,.....	435
man,	342	Tracy, Carver <i>v.</i>	427
Ross <i>v.</i> Vaughan,.....	452	Travis, Goodenow <i>v.</i>	ib
Rowan, M'Intyre <i>v.</i>	144		
Ruggles <i>v.</i> Keeler,.....	263		

U & V.

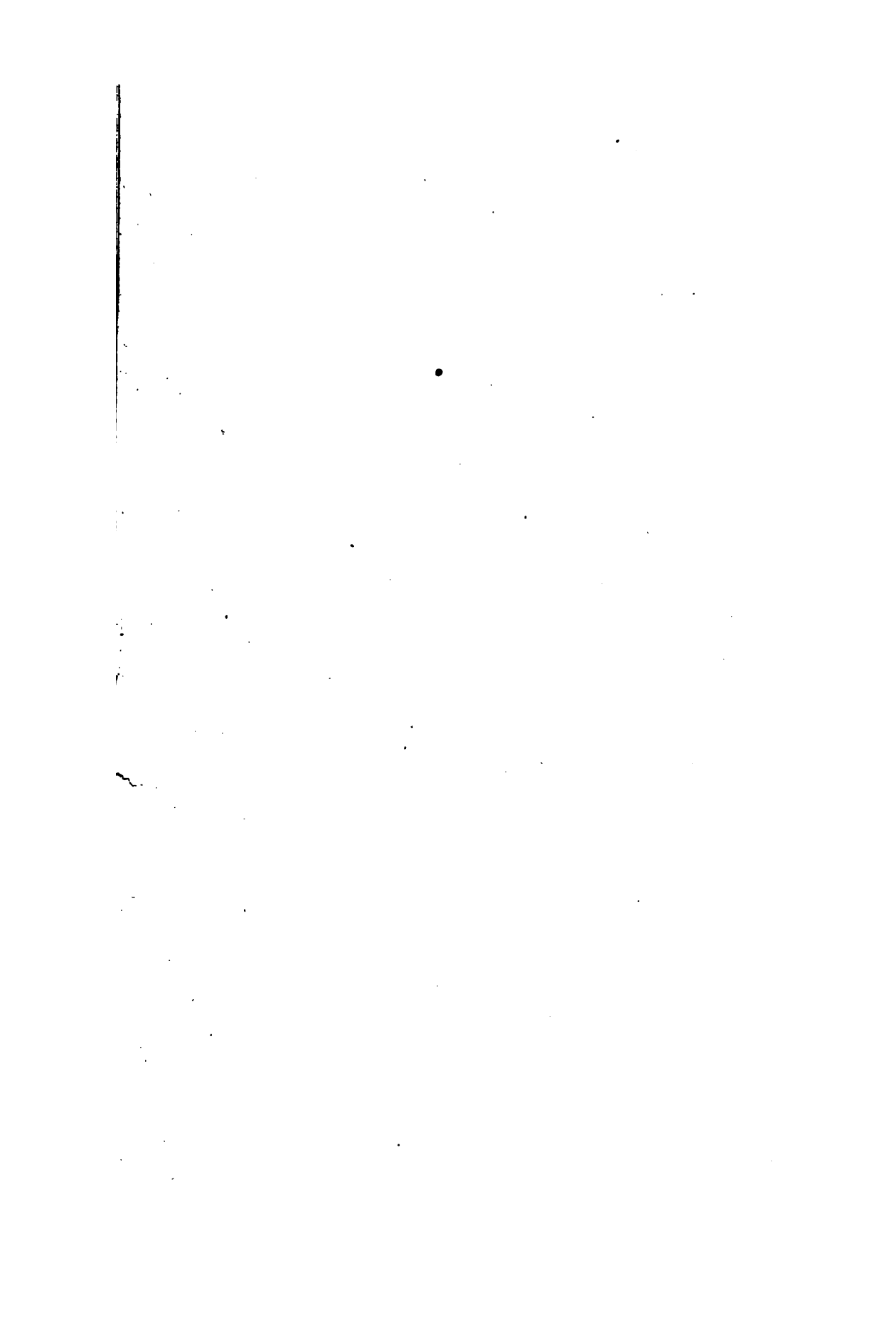
S.		Vandenbergh, Donelly <i>v.</i>	27
Sayre and Toler, Mercer <i>v.</i>	248	Van Wagenen, Tappen <i>v.</i>	465
Scissam, Jackson, <i>ex dem.</i> Vande-		Varian <i>v.</i> Ogilvie,.....	450
zen, <i>v.</i>	499	Vaughan, Ross <i>v.</i>	442
Seaman, Jackson, <i>ex dem.</i> Horn-		Vedder, Jackson, <i>ex dem.</i> Schuy-	
beck, <i>v.</i>	495	ler, <i>v.</i>	8
Schuyler, Starr <i>v.</i>	139	Vermilye, Corp <i>v.</i>	145
Scofield, M'Neal <i>v.</i>	436	Virgil, Jackson, <i>ex dem.</i> Lawe,	123
Sears <i>v.</i> Brink,	210	—— <i>v.</i> Ken-	
Serjeant <i>v.</i> Holmes,.....	428	yon, <i>v.</i>	540
Shaw, King <i>v.</i>	142		
Sherman, M'Carty <i>v.</i>	429		
Shottenkirk, De Foncleur <i>v.</i>	170		
Slocum, Brownell <i>v.</i>	430		
Sleght and Sleght, Hartshorne <i>v.</i>	554		
Smeles' Executors <i>v.</i> Elmendorf,	185		
Smith <i>v.</i> Elder,.....	105		
Smith, Lewis <i>v.</i>	157		
Speyer <i>v.</i> The New-York Insur-			
ance Company,.....	88		
Stansbury, Charles <i>v.</i>	261		
Starr <i>v.</i> Schuyler,.....	136		
Steddiford and Marschalk, Oak-			
ley <i>v.</i>	253		
Stickney, Falls <i>v.</i>	541		
Stokes and Thompson, Jackson, <i>ex</i>			
<i>dem.</i> Williams, <i>v.</i>	151		
Storey, Littlefield <i>v.</i>	425		
Styles, Kleecke <i>v.</i>	250		
Sweet <i>v.</i> Overseers of Clinton....	23		

T.

Talcot <i>v.</i> Woodruff,.....	443		
Tappen <i>v.</i> Van Wagenen,.....	465		
Thompson and Coles <i>v.</i> Parker,..	260		
Thorne, Deas <i>v.</i>	543		
Tillotson <i>v.</i> Cheetham,.....	56. 95		
—— <i>v.</i> Preston,.....	229		
Tobey <i>v.</i> Webster,.....	468		
Todd, Barlow <i>v.</i>	365		

Y.

Young <i>v.</i> Hubbell and Root,.....	430
--	-----



C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN FEBRUARY TERM, IN THE THIRTY-SECOND YEAR OF OUR
INDEPENDENCE.

On the 8th day of February, in this term, JOSEPH C. YATES, Esquire, Counsellor at Law, was appointed one of the Judges of this Court, in the place of Mr. Justice TOMPKINS, resigned; and on Thursday, the 11th day of February, he appeared and took his seat on the Bench.

THE PEOPLE *against* CUTTING.

THIS was a case of *escheat*, and came before the court on a case made and agreed upon by the counsel for both parties. The following are the material facts in the case:—

On the 16th of *June*, 1798, a *writ of escheat* issued out of the Court of Chancery, in the usual form, and an *inquisition* was thereupon taken by the sheriff of the county of *Orange*, on the 25th of *June*, 1798, which stated that **John Gatehouse*, at the time of his death, was seised in fee of a certain parcel of land in the county of *Orange*, granted by letters-patent, on the 22d *January*, 1719, to *Edward Gatehouse*. That *John Gatehouse* died, on or about the 30th *January*, 1770, without making a will, and without leaving any heir capable of inheriting the said land.

To this inquisition the defendant interposed a plea of traverse, in *December*, 1798, stating that *John Gatehouse* died, leaving *William Gatehouse* his son and heir, born at *Leominster*, in *Great Britain*, on the 28th *May*, 1725, to whom the

On a traverse of an inquest of office found behalf of the people, in a case of *escheat*, the traverser is considered as a defendant, and no
[* 2]
if he shows that the people have no title, though he prove nothing but a bare possession in himself, he will be entitled to judgment.

ALBANY,
Feb. 1808.
THE PEOPLE
v.
CUTTING.

said lands descended; and from whom the said lands, by divers descents and mesne conveyances, came to the defendant, who entered, and was thereof seised in fee, at the time of finding the said inquisition.

To this plea the attorney general replied, that the said *John Gatehouse* did not leave any heir to inherit, &c., and that the said *William Cutting* was not seised in fee of the said lands at the time, &c., and therefore he prayed that a writ of seizure might issue, &c.

Issue being joined thereupon, the defendant proved a transcript of the registry of the consistory court of the diocese of *Hereford*, in *England*, so far as related to the marriage of *John Gittoes* with *Elizabeth Bennet*, and that the same was a true transcript, and according to custom, of the register of the parish of *Whitborne*, and by which it appeared that *John Gittoes* (the son of *William Gittoes*) was baptized the 18th *December*, 1688; that a daughter of *John* and *Elizabeth Gittoes* was baptized in *June*, 1714, and *John* their son was baptized in 1716, (and died in *June*, 1729,) and *Richard* their son, in 1719, (who died without issue before his father,) and *William* their son, the 26th of *May*, 1725, and *Edmund* their son, in *October*, 1729; that *John Gatehouse* died *January* 30, 1770. It was further proved by the defendant, by depositions taken by consent, and from the transcript of similar registers, that *Edward Gittoes*, a son of *John* and *Elizabeth *Gittoes*, died without will or issue, and seised of lands in *America*, and that the father died in *January* 1770, leaving *William Gittoes* his son and heir.

* 3]

It was admitted that the patentee; his ancestors and descendants, have been known as well by the surname of *Gatehouse*, as *Gittoes*. The defendant then produced original agreements between him and the several persons therein named, tenants in possession of the premises, by which they agreed to pay rent to the defendant for several parcels of land, part of the premises in question.

The defendant further proved, that several of the tenants on the said patent paid rent to *Leonard M. Cutting*, that the defendant became entitled to his interest, and that the above tenants, in *February*, 1794, by writing and by parol, acknowledged themselves the tenants of the defendant.

This cause was argued at the last *August* term, by *Woodworth*, Attorney General, for the people, and *Ven Vechten* for the defendant.

The Attorney General. The traverser, in this case, is bound to prove two things; 1. That *John Gatehouse* died leaving an heir; and, 2. That by descent or mesne conveyance from the heir, the title has vested in him. It is admitted by the case, that the patentee died leaving *William Gatehouse* his son and heir; but the defendant has wholly failed in proving any title in himself. A mere stranger cannot interpose a trav
10

erse against the people; nor is a bare possessory right sufficient for that purpose. In *traverses* given by statute, which have taken place of the ancient mode of proceeding in *England*, by petition of right, the party traversing is considered as the plaintiff; and must, therefore, make out his own title, as well as impeach that of his sovereign, (3 *Black. Com.* 260. *Buller's N. P.* 215. 10. *Viner, Escheat*, L. 24.) on which he may have a judgment *quod manus regis amoveantur*. In the case of *The Queen v. Mason*, (2 *Salk.* 447.) it was decided, that the party who sues a *monstrans de droit*, is a plaintiff, and may be *non-suit*, and that he cannot take advantage of a want of title in the crown, or of the title of a stranger, so that if he fails in making out a title in himself, a judgment is given *quod nil capiat per breve*. Both *Blackstone* and *Buller* are decidedly of opinion, that the traverser must be considered as a plaintiff. And if the traverser allege an insufficient title, the attorney general may demur. (*Dyer*, 238.)

From the case, it is evident, that the present traverser thought it requisite to show a title in himself, for he has alleged it in his plea; and if it be necessary for him to allege a title, it is equally necessary that such title should be proved. In *England*, when an office is found for the king, he is thereby put in possession without the trouble of a formal entry. (3 *Black. Com.* 260.) If the people, then, after an office found, are to be considered in possession without an entry, it becomes essential for the party traversing to show a *title*, and not a mere possessory right. All that the present party has proved, is a possession for a few years.

Van Vechten, contra. The only point in controversy is, whether the traverser is bound to prove a title in himself. The claim of the people rests on the ground that the patentee died without making any devise or disposition of his property, and without heirs; and it will be sufficient for the traverser to disprove the facts on which the right of the people is founded; for if he shows that the patentee died seised and devised his estate, or left an heir, then the claim on the part of the people must wholly fail. *Buller* (*Nisi Prius*, 215.) mentions two kinds of offices, one for *intituling*, and the other for *instruction* or information. In the former, the crown is in possession by virtue of the inquisition. This was by the common law; and the office which gave a seisin or possession to the king, could not be traversed; but only where it entitled him to an action, and it became necessary to bring a *scire facias*. The present cannot be considered as an inquisition that vests the possession in the people, for the statute (*Laws of N. Y.* vol. 1. 316.) of this state requires a *writ of seisin* to be issued, in case judgment should be given for the people. From Sir *George Reynell's* case, (9 *Co.* 95, 96.) it appears, that there have been various and contradictory authorities and opinions on this subject. It is true, *Blackstone* and

ALBANY,
Feb. 1808.
THE PEOPLE
v.
CUTTING

[* 4]

[* 5]

ALBANY,
Feb. 1808.
THE PEOPLE
v.
CUTTING.

Buller lay it down generally, that the traverser of an inquisition is to be considered as a party plaintiff; but the case of *Regina v. Mason* seems loosely and inaccurately reported, and the editor of *Bacon* (5 *Bac. Ab.* by *Gwill.* 574.) regards it as an anomalous proceeding. In the case of the *Bankers*, (11 *State Trials*, 154.) Lord *Somers* states the true distinction, that where the subject comes to recover any thing from the king, he is to sue by *petition*, and appears as plaintiff; but when upon an office found, the subject comes to traverse the king's title, or to show *his own right*, he is in the nature of a defendant; and he says expressly, that in the proceeding by *monstrans de droit*, where the subject interpleads with the king, he is to be considered as a defendant. The traverser, in fact, pleads and acts as a defendant, and the attorney general as plaintiff. In the case of *Rex v. Roberts*, (*Strange*, 1208. *Vaugh.* 62. *Coke's Ent.* 404. *Tremain*, 628. 652.) it was expressly decided, that the traverser of an inquisition, in a case of lunacy, was to be considered as a defendant; and it was observed, that it would be absurd to construe the liberty of traversing the inquisition to give a power of delaying the crown, which would be the case, if the party were considered as having the common right of a plaintiff. The cases cited by the attorney general were those in which the crown was in possession by the inquisition, and where the judgment is *quod manus regis amoveantur*; but in the present case, the judgment must be, that the defendant be no longer disturbed or molested. By the *English* statutes, the *escheator* is supposed to have seised the lands into the hands of the king, and the party is allowed to come in and traverse the inquisition, so as to remove the hands of the king, who is deemed to be in possession. By our statute, a writ of seisin is expressly required, in case judgment is given for the people. If the present defendant should clearly prove that there had been no *escheat* in the present case, yet, according to the doctrine contended for by the attorney general, judgment must be given against him, and the tenants be turned out of possession by a writ of seisin. *This, however, is a wrong, which our statute was meant to prevent or remedy, and to put the case precisely on the same ground as an action of ejectment, where the plaintiff must prove a title, and if the defendant can show that the plaintiff has no title, judgment will be given for the defendant. The traverser, it is true, has alleged in his plea that by sundry devises and mesne conveyances, he has become entitled to the land. This was proper, in order to show that he did not come as a mere stranger to traverse the inquisition; but it is not necessary that he should prove a title in himself. It is enough, that he is a person aggrieved, and if he can show that the people have no right or title, he ought no longer to be molested by the prosecution of a groundless claim.

KENT, Ch. J., now delivered the opinion of the court. 'The
12

inquisition taken in this case, in pursuance of the *act concerning escheats*, (*Laws N. Y.* vol. 1. 310.) states, that *John Gatehouse* died seised in fee of the premises, without making a will, and without leaving any heir capable of inheriting the same. This allegation is denied in the plea of traverse put in by the defendant; and, from the facts stated in the case, it is sufficiently proved, that *Gatehouse* did leave a lawful heir, capable of inheriting the land, to wit, his son *William*. But the defendant has not shown a title derived from the heir, but merely that he was in possession of the premises by his tenants, in the year 1794. He has destroyed the title of the state, as founded upon the supposed *escheat*, but he has shown no title in himself beyond his actual possession. The question then arising upon the case is, whether it be sufficient for the defendant to impeach the title set up by the state, without setting forth his own. Many of the authorities say, that in traversing an inquisition in favor of the king, in pursuance of the statutes of 36 *Edw.* III. c. 13. and 2 & 3 *Edw.* VI. c. 8. the party traversing is considered in the character of a plaintiff, and is bound to make out affirmatively a good title in himself. (*The Queen v. Mason*, 2 *Salk.* 447. 3 *Black. Com.* 260. *Buller's N. P.* *215. *Vaugh.* 64.) These cases are, however, met and opposed by opinions which lay down a contrary doctrine, and one which appears to me to be more rational, and more agreeable to the forms and course of pleading. In the argument of Lord Keeper *Somers*, in the case of the *Bankers*, in the Exchequer, (11 *St. Tri.* 154.) he observed, that where an office is found in favor of the king, under the statute of *Edw.* III. the subject might come in and interplead, either by denying the title found for the king, or by showing his own right, and that in such case he was to be considered in the light of a defendant. The same observation is made by the last editor (*Gwillim*) of *Bacon.* (vol. 5. 574.) The party appears upon the record in the character of a defendant. He shows his right in the form of a plea, and if he may be nonsuited, as the case in *Salkeld* adjudged, the proceeding is quite anomalous. The case of *The King v. Roberts* (*Str.* 1208.) is one of the latest that we have upon this question. The Court of King's Bench there resolved, that the traverser of an inquisition, finding him a lunatic, was to be considered as a defendant opposing the title of the crown, without setting up any title in himself. The point cannot, therefore, be considered as altogether settled in the *English* law, although it must be admitted that the weight of the authorities is on the side of the prerogative. But our statute contains provisions different from those in the *English* statutes, and I think it will authorize us to consider the party traversing as sustaining the character, and entitled to the privileges of a defendant, and that it will therefore be sufficient for him to destroy the title set up by the state. The statute is altogether silent as to the judgment to be rendered

ALBANY,
Feb. 1808.
THE PEOPLE
v.
CUTTING.

[* 7 :]

CASES IN THE SUPREME COURT

ALBANY,
Feb. 1908.

JACKSON
v.
VEDDER.

[* 8]

in favor of the party ; but if the judgment be in favor of the people, the sheriff is required by writ to seize the lands into his own hands. The like writ is also to issue if no traverse be taken, and when the state shall have disposed of the lands, the sheriff is to deliver possession to the purchaser. The office or inquisition mentioned in *the act seems, therefore, to be one which does not operate like the inquest of office mentioned in the statute of *Edw. III.* of "*a seizure into the king's hands.*" The writ of seizure necessarily implies that possession had not previously vested in the state. The *English* statutes contain no such provision, but they consider the inquisition as of itself vesting the seisin in the *escheator*, and such, no doubt, is the ordinary operation of an inquest of office in behalf of the state. (*The People v. Brown, November term, 1803. 1 Caines, 416.*) We are, therefore, of opinion, that under our statute we may consider the party traversing as a defendant in possession, and consequently entitled to protect himself by showing the inquisition to be untrue.

SPENCER, J., having been concerned, when attorney general, as counsel for the people, declined giving any opinion.

Judgment for the defendant

JACKSON, *ex dem.* SCHUYLER and others, *against*
VEDDER.

Where a partition was made by the proprietors of *Klock's* patent, and a survey and map made for them, and possession taken accordingly, by the several proprietors, it was held, that, after a lapse of forty years, the parties were concluded from contesting with each other, the correctness of the actual locations.

[* 9]

THIS was an action of ejectment, for lot No. 102, in *Klock* and *Nellis's* patent, in the town of *Palatine*, in *Montgomery* county.

The cause was tried, the 3d *October*, 1806, at the *Montgomery* circuit, before Mr. Chief Justice *Kent*.

The defendant admitted, that the lessors of the plaintiff were owners of lot No. 102 ; and the plaintiff admitted, that the defendant was owner of lot No. 101, in the patent. The patent was granted, the 2d *December*, 1754, to *George Klock, William Nellis*, and fourteen other persons. On the part of the plaintiff, *Jacob G. Klock*, a witness, produced a map, and proved, that before the division of the patent, he, as surveyor for the proprietors, had traversed the creeks, which bounded the patent at each end ; and from that traverse, and the outlines of the patent, he made the outlines of the map, and laid out the patent into *lots, before the inner lines were surveyed, and numbered them on the map as they now are ; that the proprietors of the patent, as early as 1756, (and before the patent was divided into lots by actual survey,) met and made a division, by ballot, of the lots ; and that he put on each lot, on his map, the name of the person who drew it, except the lots drawn as the share

of Sir William Johnson: That at the time he made the map produced, he made another like it, which he gave to the proprietors; but where it then was, he did not know. That the proprietors made a partition, by one of the maps, and, according to the map, the defendant lives on lot No. 102: That lots No. 101 and 102 are in the middle tier of lots, and that between the creeks, on the line between the southern and middle tiers of lots, there is a sufficient distance to give to each lot its full width, according to the map, and leave a distance of one chain and 80 links, between the S. W. corner of lot 103 and the Canada creek: That soon after the said partition, he surveyed the southern tier of lots, and Henry Frey surveyed the middle and northern tiers for the proprietors: That he did not know how many acres were in lots No. 104 and 105, but they were laid down for 200 acres each.

Philip R. Frey, a surveyor, a witness on the part of the defendant, testified, that he commenced his survey at the Caroga creek, at the corner of lot No. 51, and surveyed the line between the southern and middle tiers of lots: That he did not regard the width of the lots, as represented on the map, but surveyed according to the monuments which he found upon the line, standing as the corners of the lots in the middle tier, and that, according to those monuments, the defendant possessed no part of lot No. 102, but possessed lot No. 101, and that, according to his survey, the S. W. corner of lot No. 102 is 1 chain and 37 links from the Canada creek, and is the last lot with square corners, in the middle tier, and that lot No. 105 contains 39 acres, 3 roods, and 24 perches only: That the greater number of monuments which he found as the corners of lots, were stakes: That he found some marked trees, which he judged to have been marked thirty years: That the possessions on the lots in the middle tier corresponded with the survey: That from the corners of the lots, as ascertained by him, ancient lines generally extend to the N. as division lines of the lots, which appear to be thirty or forty years old: That he had traversed both the Caroga and Canada creeks, as far as the middle tier extends on those creeks: That he surveyed the whole of lots No. 104 and 105, as laid down on Klock's map, and found them to contain 224 acres, and which are designated in the map made by him, as lots No. 103, 104, and 105: That by a deed, executed in 1765, by some of the patentees, lot No. 51 is 15 chains, and lot No. 53 27 chains wide, which corresponds with the survey: That lots No. 60, 91 and 92 were settled in 1775, and lots No. 68, 79, 80 and 93 have been settled twenty years.

Another witness for the defendant testified, that he lived on lot No. 156, in the northern tier: That the S. end of the lot, and the N. end of the lot occupied as No. 100, in the middle tier, join: That the corners of these lots, at their ends, are about a chain distant from each other: That No. 100 is E. and ad-

ALBANY,
Feb. 1808.

JACKSON
V.
VEDDER.

[* 10]

ALBANY,
Feb. 1808.

JACKSON
v.
VEDDER.

joins No. 101, as now occupied by the defendant: That the lot occupied as No. 157, in the N. tier, stands against No. 101, as possessed by the defendant, with the difference of their corners, one chain apart: That No. 155 stands against the lot occupied as No. 99, according to *Frey's* survey, with about the same difference as to their corners: That lot No. 157 stands over against No. 101, on which the defendant lives: That he moved on to the patent, thirteen years before, and then found a tree marked as the corner of No. 155 and 156, in the N. tier, and from that, he judged that he lived on lot No. 156, and he supposed that the marks were twenty or thirty years old.

[* 11]

The plaintiff then gave in evidence a release in fee, executed the 27th September, 1765, by twelve of the proprietors of the patent, to *John Windecker*, of lots No. 15, 86 *and 193, in which release, the boundaries of the patent were described, and the release recites, that the said patent is laid out into 165 lots, of 100 acres each, and that, on drawing, the said *John Windecker* drew the aforesaid lots. The boundaries of the three lots are described in the release; and No. 103 is recognized as a square lot, and the last square lot in the map, but by *Frey's* survey, it is not a square lot. The plaintiff then offered in evidence a record of a verdict and judgment in ejectment, against *Schuyler*, one of the lessors, as defendant, brought to recover from him the lot adjoining to and W. of the lot on which the defendant lives; and offered to prove, that the lessors in that action claimed the said lot as No. 103, and that, while that action was pending, the present defendant *promised*, that if *Schuyler* lost the suit, he would give him the lot on which he lives; which evidence was overruled by the judge.

The plaintiff then read in evidence, an act of the legislature, passed the 11th April, 1795, to confirm the partition of the said patent.

The judge charged the jury, that the act had no bearing on the question, as it was only to secure to each proprietor the lot by number, which had been drawn by him, without fixing its location. That in his opinion, the monuments and possessions spoken of by *Frey* ought more to be regarded in locating the lots, than *Klock's* map, and that, if the jury believed that the survey of *Philip R. Frey* corresponded with the survey made by *Henry Frey*, soon after the partition mentioned by *Klock*, they ought to find for the defendant, and the jury found accordingly.

At the last August term, the plaintiff moved to set aside the verdict; 1st. Because it was against evidence. 2d. Because the record ought to have been received as evidence. 3d. Because the charge of the judge was incorrect, as to the statute and as to the operation of the monuments, &c.

Cady, for the plaintiff.

Van Vechten, contra.

**Per Curiam.* Upon the consideration of this case, we are of opinion, that the motion on the part of the plaintiff be denied. The partition on the map was reduced to practice, by the actual survey of *Henry Frey*, soon after it was made. That survey was made for the proprietors, and if possessions have been taken and held accordingly, the proprietors, and those claiming under them, ought certainly, after a lapse of forty years, to be concluded from contesting with each other, the correctness of the actual locations. It was a matter of fact left to the jury, whether the lines of that ancient survey were not now to be ascertained, and whether the recent survey of *Henry Frey*, and the possessions and settlements did not correspond with the original survey. The verdict of the jury ought to put that fact at rest, and the repose of the settlements, and public quiet, would seem to require, that a verdict in favor of a survey so long established, should not be disturbed.

The questions of law were correctly decided upon the trial. It is a well settled rule, that a verdict cannot be given in evidence against a person who was not a party or privy to it; and the act of the legislature most clearly did not, and could not, settle the question of the actual location of the lots.

Rule refused.

JACKSON, *ex dem.* CASSELMAN, *against* LEPPER and
DILLENBACK.

THIS was an action of ejectment, for lands in *Montgomery* county. The cause was tried before Mr. Chief Justice *Kent*, the 3d *July*, 1805. The lessor of the plaintiff claimed the premises, as part of lot No. 50, in the second allotment of the *Stone-arabia* patent, and gave in evidence, on the trial, a deed from *Martinus Dillenback* to **Dederick Dillenback*, dated the 30th *March*, 1766, for the said lot, and a deed from *Dederick* to the defendant, dated the 4th *February*, 1789, for the north end of the lot. Neither of the deeds mentioned the courses or length of the lines of the lot. In the *field book* of the survey of the second division of the patent, lot 50 is thus described, "beginning at S. E. corner of lot No. 47, and running thence E. 12 chains, thence N. 88 chains, thence W. 12 chains, thence S. 88 chains to the place of beginning." One *Beekman*, a surveyor, testified for the plaintiff, that he had surveyed the whole tier of lots of the second division of *Stone-arabia*, including lot No. 50, and began at a place shown as the beginning of the second division, by the parties living on both the second and third divisions, and he found ancient possessions, and marked trees, until near the defendant's lot, and agreeing with the lines con-

ALBANY,
Feb. 1808
JACKSON
v.
DILLENBACK.

Lot No. 50, in the second allotment of *Stone-arabia* patent, is to be held according to the survey of the
[* 13]
patent made by *Hendrick Frey*, in 1754, and as designated and described by that survey.

ALBANY
Feb. 1818.
JACKSON
V.
DILLENBACK.

tended for by the plaintiff: That the marked trees, from their age, agreed with the division made by one *Schuyler*, in 1733, and that the defendants' possession, within the bounds of lot No. 50, as claimed by the plaintiff, is not above eight or ten years old: That, according to his opinion of *Schuyler's* line, the defendants have ten or twelve acres of the plaintiff's land in their possession. *Dillenback*, one of the defendants, claimed the premises as part of lot No. 16, in the third allotment.

The defendants proved, that in 1754, one *Hendrick Frey* made a survey of the patent for the proprietors, and laid out a part of it into lots: That he made a map, on which he designated the lots, before laid out, as well as the lots which he then laid out, and annexed to the map a description of the boundaries of each lot, and the persons for whom they were laid out in the third allotment, in which allotment, No. 21 is described, as laid out for *Martinus Dillenback*, and No. 16 for *Hendrick Dillenback*, and the courses and distances of each of the said lots, and of lots No. 22 and 17, are particularly described.

The defendant gave in evidence a deed executed the 18th of March, 1754, from *Martinus Dillenback* and twenty-seven *others, owners of the said patent, to *Hendrick Dillenback*, for lot No. 16, in the third allotment, and the lot is described as above-mentioned. It was proved, that *Hendrick Dillenback* was dead, and that *John Dillenback*, one of the defendants, was his devisee.

One *Lansing*, a witness for the defendants, testified, that he surveyed the premises, and began at a black oak tree, marked, at the N. E. corner of lot No. 58, and the S. E. corner of lot No. 16, marked in 1754: That he run on *Frey's* line, and found marked trees, and no land S. of that line in the possession of the defendants: That 30 chains and 50 links N. of that line, he found an old line of marked trees, between lots No. 16 and 17, and, according to which line, ancient possessions on lot No. 17 agree: That 30 chains and 50 links from the black oak tree, he found a large white pine tree marked as the corner between lots No. 16 and 17, and that he run 95 chains S. from the E. line of 58, and did not reach the patent line.

On this testimony, a verdict was taken for the plaintiff, subject to the opinion of the court, upon a case containing the above facts.

Van Vechten, for the plaintiff.

Cady, for the defendant.

Per Curiam. We are of opinion, in this case, that the defendant ought to succeed, and, consequently, that judgment of nonsuit must be entered according to the stipulation in the case.

The *Stoney Arabia* patent was surveyed for the proprietors, in

1754, by *Hendrick Frey*. *Martinus Dillenback* was then one of the proprietors, and the lessor of the plaintiff derives his title to his part of lot No. 50, in the second allotment of the patent, under a conveyance from the said *Martinus*, executed in the year 1766. The deed did not specify the courses or length of the lines of the said lot, but simply conveyed the land as lot No. 50. According to *Frey's* survey, the defendants are not in possession of any part of lot No. 50, and *Dillenback* and those *who claim under him, ought to be confined to lot No. 50, as designated by *Frey's* survey. Until the contrary appears, (and it does not appear in the present case,) we must intend that *Frey's* survey was acquiesced in by the proprietors, and that lot No. 50, by that general description, was intended to be as ascertained by that survey.

ALBANY.
Feb. 1808.
WYNKOOP
v.
OVERSEERS
of POOR.

[* 15]

Judgment of nonsuit.

WYNKOOP against THE OVERSEERS OF THE POOR OF
THE CITY OF NEW-YORK.

ON the 9th day of *May*, 1805, an order was made by the special justices of the city of *New-York*, on the application of the overseers of the poor of the said city, charging *Peter Wynkoop*, the reputed father of a bastard child, born of *Sarah Waring*, with the payment of one dollar and twenty-five cents weekly, for the sustenance of the said child. Upon notice of the said order, *Wynkoop* appealed therefrom, and put in surety to appear at the next general sessions of the peace, according to the statute. Upon examination of the matter, before the sessions, it appeared in evidence, that *Wynkoop* was the father of the said child. That *Sarah Waring*, the mother of the said child, was born at *Stamford*, in the state of *Connecticut*, where she resided with her father, who was settled in that town. That she came to the city of *New-York*, about the 1st day of *May*, 1801, and resided with her brother-in-law, in the capacity of a domestic servant, from that time until the 19th day of *January*, 1805, when she was delivered of the child. That the said *Sarah Waring* had not been bound apprentice or servant to any person in the city of *New-York*, by any indenture, or other contract; but that a verbal agreement had been made between her and her brother-in-law, that she should live in the family as a servant, at the wages of four dollars per *month, which had been paid her. That no time was fixed for her continuance; but as long as they could agree, she was to continue, and not to leave him, without giving previous notice of her intention so to do. Upon this evidence, the sessions affirmed the order of the justices.

It was submitted to the court, without argument, whether

S. W. was born in the state of *Connecticut*, where she had a legal settlement, and on the 1st *May*, 1801, came to reside in the city of *N. York*, where she continued with the family of a relation in the capacity of a servant, until the 19th *January*, 1805, when she was delivered of a bastard child. She had not been bound as an apprentice or servant to any person, by indenture or contract in writing, though there was a verbal agreement that the

[* 16] person with whom she lived should pay her wages. On the application of the overseers of the poor of the city of *N. York*, an order was

ALBANY,
Feb. 1808.

LEWIS
v.
DAVIS.

the said *Sarah Waring*, at the time she was delivered of the said bastard child, was legally settled in the city of *New-York*, and if not, whether the said justices were competent to make the order aforesaid.

made, charging the reputed father of the child with its maintenance, which order, on an appeal to the sessions, was affirmed. On a *certiorari* to this court, it was held, that the mother had no legal settlement in *N. York*, and that it was competent to the justices to grant the order of filiation. *It seems, that where the mother of a bastard child has no legal settlement within this state, the child acquires a settlement by birth. (a)*

SPENCER, J. The legal settlement of *Sarah Waring* appears to have been in *Stamford*, in the state of *Connecticut*; and her residence in *New-York* was not of that kind, as to acquire a legal settlement there. This, however, does not touch the question arising in the case, which is, whether the justices of *New-York*, where the child was born, can make an order of filiation, when the mother has no legal settlement there: and it is supposed that they cannot, because the settlement of the bastard follows that of the mother.

The first section of the act for the relief of cities and towns from the maintenance of bastard children, expressly gives the power to any two justices of the peace of any city or county, upon examination of the matter, to make an order for the relief of the city or county within which any bastard shall be born. The removal of paupers is only an auxiliary remedy, and it was competent to the overseers, to apply for the order of filiation. The appellant is, at all events, bound to contribute to the sustenance of this illegitimate child. In my opinion, the justices had the power to make the order they did, and it must be affirmed.

(a) *Overseers, &c. of Canajoharie v. Johnston: Overseers, &c. of Fernon v. Smithville* 17 Johns. 41. 89.

VAN NESS, J., and THOMPSON, J., were of the same opinion

[*17]

KENT, Ch. J. I am also of opinion, that the order must be affirmed, but for this reason principally, that, as the child was born in *New-York*, and the mother had no settlement *within the state, the child must be adjudged to be settled where it was born. The law, declaring that every bastard child follows the settlement of the mother, applies only to cases where the mother has a legal settlement within the state. If she has none, the child must be chargeable to the town where it was born, and it cannot be sent out of the state. It becomes a native citizen, by birth, and is entitled to protection, as well as bound to allegiance.

Order affirmed

LEWIS against DAVIS.

Where the crew of a vessel were permitted by the first mate, in the absence of the master,

ON the return to the *certiorari* directed to the Justices Court in the city of *New-York*, the following facts appeared: The defendant in error brought his action against the plaintiff in error, in the court below, to recover his wages as a mariner

on board of a vessel of which the plaintiff was master, on a voyage from *New-York* to *Bayonne*, and back to *New-York*. The plaintiff below claimed his wages at the rate of 20 dollars per month, from the 25th of *May*, to the 25th of *October*, 1806. The defendant pleaded *non assumpsit*, and payment, with notice that he should give in evidence an embezzlement of a part of the cargo, after the arrival of the vessel in *New-York*, a proportion of which was to be charged to the plaintiff. On the trial, the defendant below proved, that a bale of goods, part of the return cargo, was shipped at *Bayonne*, and that the vessel arrived at *New-York* direct from that place, on the 17th day of *October*; that on the 18th, she came to the wharf, and on the 19th of *October*, the bale of goods was missing. The crew went on shore on the 18th *October*, and returned on board again the 19th. On the night between the 18th and 19th of *October*, the fore-scuttle was broken open. It appeared, that it was customary, after a vessel has come to the wharf, to permit the *seamen to go on shore; and stay all night, and that permission would have been given in this case, had it been asked. The first mate of the vessel gave leave to the whole crew to go on shore, but requested the second mate to return and sleep on board during the night; but he did not return, and the only person that remained on board that night was the cabin boy. It was not pretended that any part of the crew were concerned in the robbery. Upon these facts, the court below were of opinion, that the crew were not bound to contribute to the loss, as there was no evidence of any collusion or negligence in them, so as to make them liable where the loss could not be brought home to any one in particular; and that the loss ought to be borne by the person to whose care the vessel was committed for that night, the rest of the crew having left the vessel by the permission of the first mate; they, accordingly, gave judgment for the plaintiff.

Mulligan, for the plaintiff in error.

*Antho*n, contra.

KENT, Ch. J., delivered the opinion of the court. Admitting the rule of the maritime law to be, that mariners are to contribute out of their wages to the damages arising from embezzlements by each other, during the voyage, yet if negligence be not imputable to them, and the circumstances of the case do not fix the presumption of embezzlement upon any of the crew, they ought not to contribute. In the case before us, the first mate gave the crew permission to go on shore, requiring only that the second mate should return and sleep on board. The loss ought, in justice, to attach upon the person to whom the care of the vessel was committed for the night. The conclusion which has been drawn against any collusion or negligence

ALBANY,
Feb. 1808.

LEWIS
v.
DAVIS.

to go on shore, and the second mate was ordered to return and take care of the vessel at night, but neglected to do so, and some part of the cargo was stolen out of the vessel, it was held, that the crew were not liable to contribute out of their wages to make good the loss. If seems, that where the loss or embezzlement can be traced to a particular seaman, the rest of the crew ought not to contribute.

ALBANY,
Feb. 1808.

HOWLAND
v.
RALPH.

[* 19]

on the part of the crew, cannot be said to be unwarranted by the testimony. The mate commands in the absence of the master, and after the decision below upon the facts, (which is equivalent to a verdict,) we may well conclude that the master was not on board, and that *the permission given by the mate was competent to justify the crew. If the loss be chargeable to the negligence of the second mate, who ought to have returned on board, I do not think it just or reasonable, that the seamen, who remained on shore by lawful permission, should be held to a contribution. *Molloy* does not state the rule on this subject with much precision, nor is he of much authority; but he rather seems to place it upon the ground of fault or negligence in the mariners; (book 2. c. 3. § 9.) and even the limited extent to which he carries it, in this instance, has been recently questioned or denied by the Court of *C. B.*, in the case of *Thompson v. Collins*, (4 *Bos. & Pul.* 347.) who were inclined to think that each person ought to answer for his own default. On the other hand, the mutual responsibility of seamen has been carried to a greater extent in the decrees of the District Court of *Pennsylvania*, (1 *Peters's Adm.* 243.) and further, I apprehend, than in any of the marine ordinances annexed to the reports of those respectable decisions. Assuming, however, the rule to the extent in which it is laid down in *Molloy*, it is sufficient that the facts in this case did not lead to the conclusion, that the plaintiff below was chargeable with fault or negligence, or that the embezzlement was to be imputed to any of the crew. We are, therefore, of opinion, upon the consideration of the case, that the judgment below must be affirmed.

Judgment of affirmance.

[* 20]

*HOWLAND against RALPH.

IN *August* term last, a motion was made to set aside the execution issued in this cause, to the sheriff of *Delaware*, and which had been levied on a lot of land, that had been previously purchased from the defendant, by one *Mc Nee*. The motion was made in behalf of *Mc Nee*, who stated in his affidavit, that on or before the 24th day of *May*, 1804, he purchased the lot so levied on, from the defendant, for which he paid him 350 dollars, as being clear from all encumbrances: That about the 10th *June*, 1807, he learned, that prior to the purchase, a judgment had been entered up in favor of the plaintiff, against the defendant, and that a *fieri facias* thereon was in the hands of the sheriff. The judgment was docketed the 21st *July*, 1803, and the land was advertised by the sheriff, for sale, on the 23d *June*, 1807. *Mc Nee* further stated, that he applied

to the defendant, who told him, that he had paid the amount of the judgment, but being requested to make an affidavit of this, in order to have the proceedings stayed, he refused; that the plaintiff and defendant had corruptly combined together, to cause the land, which the defendant had purchased, to be sold by means of the judgment. There were several other affidavits, stating, that the defendant had declared, that he had paid the bond on which the judgment had been entered up in favor of the plaintiff.

On the 15th *June*, 1807, an order was granted by Mr. Justice *Van Ness*, to stay all proceedings on the execution, so far as it regarded the lot in question, until the last day of *August* term. An affidavit was read, that a copy of the judge's order was served on the deputy sheriff, who held the execution, on the 23d *June* last, and prior to the sale of the land by him, and that he promised not to proceed in the sale; but that he did, notwithstanding, sell the land, on the same day. On these affidavits, the court ordered all proceedings to be stayed until *November* term, that the *sheriff retain in his hands the moneys levied on the *fi. fa.*, and that he do not execute a deed to the purchaser, until further order. It was further ordered, that the deputy sheriff show cause, by the first day of *November* term, why an attachment should not issue against him, for a contempt, in disobeying the judge's order, in *June* last, and why he should not pay over the money, levied by him, to *Mc Nec*.

At the last *November* term, the plaintiff's affidavit was produced, which stated, that the judgment in this cause was entered upon a bond, the whole of which was justly due at the time the execution issued; that the payments made by the defendant were on account of other transactions between him and the defendant, which had no relation to the bond: and that he had never confessed or declared, that the judgment was satisfied, the truth of which statement was admitted by the affidavit of the defendant. From the affidavit of the plaintiff's attorney, it appeared, that the defendant gave his consent, in writing, that the execution might issue on the said judgment without its being revived by *scire facias*, which consent was filed in the clerk's office. It further appeared, that though a copy of the judge's order was served on the deputy sheriff, the original order was not shown to him.

Hawkins, in support of the motion.

Sherwood, contra.

Per Curiam. It appears, from the affidavit of the deputy sheriff, and of the person who made the service upon the deputy, that a copy of the judge's order was served, but that the original order was not shown. The general rule is, that in order to bring a party into contempt, the *original* order

ALBANY,
Feb. 1808.

HOWLAND
V.
RALPH.

facias, the execution will not be set aside for irregularity, at the instance of a third person, who alleges, that the judgment has been kept on foot collusively, and that the execution has been issued fraudulently, to injure him; but he must be left to seek his relief in a court of

[* 21]
chancery against the fraud, or by bringing the question of fact, as to the fraud, to a trial, by an issue at law

ALBANY,
Feb. 1838.

SWEET
V.
OVERSEERS
of CLINTON.

[* 22]

must, at the same time, be shown. (*King v. Smithers*, 3 Term, 351. See 2 *Johnson*, 104. *Cheetham v. Lewis*.) The motion for an attachment against the deputy sheriff must, therefore, be denied. The next question is, whether we can upon the present motion, relieve *William Mc Nee*, from the effect of the sale. The execution would clearly have been irregular, for want of a revival of the dormant judgment, *had it not been for the defendant's consent in writing, to issue the execution, without such revival, and the question is, whether that consent was not sufficient to cure the irregularity. There is no complaint on the part of the defendant, that it was unfairly obtained from him; and we cannot question the proceeding in the face of that consent, and without any application on the part of the defendant. If a *scire facias* had issued, it would not have been directed to *Mc Nee*, the party complaining; and, as the defendant admits that the judgment was not satisfied, its operation would have been the same, as it respects *Mc Nee*. He could not have come in and pleaded. He would have been a stranger to the record. The great ground of complaint is, that there exists a collusion between the plaintiff and defendant, to defraud him, and that the judgment has been collusively kept on foot, and an execution fraudulently issued, to injure him. If this be so, (and there is color for the suggestion, arising from the facts disclosed by the affidavits.) he is, undoubtedly, entitled to relief against the fraud. But this court cannot interfere effectually, upon the present motion. If the deed was not executed to the purchaser, before the service of the rule of last August term, we can continue that rule in force against the sheriff, until the next term, so as to give *Mc Nee* an opportunity to apply, in the mean time, to the Court of Chancery for relief, or to put the question of fraud and collusion in a train for trial at law, by an issue in fact, and so far we are willing to go.

[* 23]

*SWEET against THE OVERSEERS OF THE POOR OF THE TOWN OF CLINTON.

An order of bastardy made by two justices, pursuant to the statute, is *prima facie* evidence of the truth of the facts therein stated, it being considered as a judgment of the magistrates. (a) If

THIS cause came before the court on a return to a *certiorari* from the Court of General Sessions in *Dutchess* county. An appeal had been made to the sessions, from an order of bastardy made by two justices of the peace. Upon the traverse to the appeal, it was contended, on the part of the appellant, that the overseers ought to proceed to establish the order by proof; that the subject ought to be examined in the same manner, as it had been before the justices, who granted the order, and that the overseers ought to call the mother of the child, on whose oath the order had been founded. The Court of Sess.

(a) *The Overseers of the Poor v. Sweet*, 10 Cl. & F. 24.

determined, that the order was *prima facie* evidence of the facts contained therein; and that it was incumbent on the appellant to prove that the facts set forth in the order were not true. Testimony was also offered, on the part of the appellant, to impeach the credit of the mother; but the court determined, that, as she had not been examined as a witness before the sessions, her character was not to be questioned. The appellant then offered to call her as a witness, reserving the right afterwards to impeach her credit; but the court decided, that if the appellant chose to call her as a witness, he should not be allowed, afterwards, to impeach her testimony. The sessions having confirmed the order of the justices, the appellant tendered a bill of exceptions, which was sealed by the judges of the sessions, and returned, with the order and other proceedings annexed to the *certiorari*, to this court.

ALBANY.
Feb. 1808.

SWEET
v.
OVERSEERS
of CLINTON.

the party appeal from the order, it is incumbent on him to impeach the truth of the facts. The Court of Sessions are judges of the law and the fact, and a bill of exceptions does not lie to that court. This court may order the sessions, by *certiorari*, to return all the facts and proceedings before them. (a)

[* 24]

(a) *Overseers of Brookhaven v Southold*, 2 Cow Rep. 575

Rudd, for the plaintiff in error. The order, in the first instance, is made on the *ex parte* affidavit of the mother; and on an appeal, the sessions ought to allow the parties to produce new evidence; they ought not to be concluded by the facts, as they appeared before the justices. By the statute of the 18 Eliz. c. 3. an order of bastardy could *only be made by two justices; but by the statute of 3 Car. I. c. 4. the sessions have an original jurisdiction in cases of bastardy. It was so decided in *William Slater's* case, (Cro. Car. 470.) and in *Pridgeon's* case; (2 Bul. 355. Cro. Car. 341. 350. 1 Str. 475. Doug. 632. 1 Burns's Justice, 20th ed. 246, 247.) and the sessions may not only make an original order, but they may quash the order of the justices, and make a new order, against which there can be no appeal. (2 Bulstr. 355. 1 Bott. 498. 1 Burns, 247.) By our statute, the putative father is to enter into a recognizance, not only to perform the order of the justices, but to appear at the next General Sessions of the Peace, and to abide such order as the sessions may make. (Laws of N. Y. vol. 1. p. 194, 195.) The sessions are thus fully empowered to make any order they may judge proper, and for that purpose to enter into an examination of the case *de novo*. In the present case, the course of proceedings adopted by the sessions, effectually deprives the party of all the benefit of an appeal.

J. Tallmadge, contra. A preliminary question arises in this case, whether a bill of exceptions will lie to the sessions on an appeal from an order. In the case of *The King v. The Inhabitants of Preston*, (2 Str. 1039. 2 Burr. Sett. Ca. 77. Ca. temp. Hardw. 249. Bott. 705.) it was expressly decided, that a bill of exceptions would not lie in such a case.

By the order of the justices, it is stated, that it was made as well on the oath of the mother, as otherwise. It may be, then, that the justices had other evidence before them. On an appeal, every intendment is to be made in favor of an order of

ALBANY,
Feb. 1808.

SWEET
V.
OVERSEERS
of CLINTON.

justices. (3 *East*, 61.) The appellant ought, therefore, to prove facts sufficient to induce the sessions to set it aside. (2 *Bott*. 17.) He ought to show cause against the order, before the other side are called upon to support it. The sessions, as a court, have competent power to regulate their own practice, and the course of proceedings before them on appeals. The language of the act, as to the condition of the recognizance, countenances this idea.

[* 25]

The appellant clearly had no right to impeach the character of the mother as a witness, when she had not been sworn in the cause then before the sessions. You cannot, in one court, impeach the credit of a witness sworn in another *court, until after such witness has been called in, and sworn in the court in which his credit is intended to be impeached. If the appellant had called the mother as a witness, it would have been against the established rule in all courts, to have allowed him to impeach the character of his own witness.

The order of the justices is never granted until the putative father is summoned to appear and show cause. By appealing from the order, the appellant is bound to show affirmatively, that the order ought not to have been made against him.

Rudd, in reply. Some difficulty has arisen in the *English* courts, as to the manner of bringing these causes before the higher tribunals. The Court of *K. B.* have decided, that they would not inquire into the facts adjudged before the sessions; but that when they erred in matters of law, that court would interfere, to correct their errors. (2 *Burr. Sett. Ca.* 77.) The usual course seems to have been, to bring the question before the higher courts, on special cases. But it has been determined, in *England*, that the Court of *K. B.* has no power to compel the sessions to state a special case. (2 *Burr. Sett. Ca.* 64. *Bott*. 1850.) If this is to be the rule in this court, and no bill of exceptions will lie, the errors of the sessions can never be corrected. It becomes, then, a point of practice of some importance to determine, whether the decisions of the sessions may be reviewed, or must be final and conclusive. It is true, inferior as well as other courts may establish their own rules of proceeding, but the Supreme Court will never permit an inferior court so to frame its rules of practice, as to avoid the correcting and controlling power of the higher tribunal.

As to the words of the order, it is sufficient to observe, that it is always so expressed, but it does not follow, that any other evidence than the oath of the mother was produced. It seems unreasonable to require the appellant to prove a negative. The natural and proper course is, to call on the overseers to establish the truth of the facts on which the order was founded.

[* 26]

**THOMPSON*, J., delivered the opinion of the court. This case is brought up by *certiorari* from the Court of Sessions in *Dutch-*
26

ss county. It came before the sessions by appeal, on an order of bastardy, made by two justices of the peace, and the question presented to this court is, whether, on such appeal, the order of the justices ought to have been received by the sessions as *prima facie* evidence, and to be impeached by the appellant, or whether the sessions are to take up the examination *de novo*, as if no order had been made. We have not been able, from an examination of the cases cited on the argument, to find that the question has ever received any judicial determination, or to ascertain what the practice has been. We are inclined, however, on general principles, to think, that the order ought to be received as *prima facie* evidence, and the *onus* of impeaching it thrown on the appellant. This order was the judgment of magistrates, having jurisdiction of the subject-matter. It is final and conclusive upon the party, unless reversed on appeal, and no appeal lies to take the case from the magistrates, until they have passed judgment upon it. The appeal is for the purpose of revising and correcting the errors of the magistrates, and their judgment ought to be deemed valid, until some ground for reversing it be shown.

A question was also made, on the argument, whether a bill of exceptions would lie to a court of sessions. It appears to be pretty well settled, by the cases in the books, that it will not. In those summary proceedings, the sessions are judges, both of law and fact, and it would seem to be the intention of the statutes, instituting these proceedings, that what the justices do shall be final as to facts, and every thing but the law arising therefrom. (2 *Strange*, 1040.) If the sessions do not return to the *certiorari*, all the facts which were before them, and which are necessary to appear, in order to judge of the law applicable to the case, the practice I apprehend to be, for *this court to order the sessions to return such facts. (1 *Term*, 775. *Burr. S. C.* 697.)

The order of the sessions must be affirmed.

Judgment affirmed.

ALBANY,
Feb 1838.

DONELLY
v.
VANDEN
BERGH.

[* 27]

DONELLY against VANDENBERGH.

THIS was an action of *debt*, for the penalty of 500 dollars. The cause was tried at the circuit, held in *Greene* county, before Mr. Justice *Spencer*, the 3d *December*, 1806.

The declaration stated, that by an act of the legislature, in 1803, the plaintiff, *William Tremble*, *Jacob Vanderhoff*, and four others, had granted to them, for seven years, the sole and exclusive right of erecting and running so many stage-wagons, on the west side of *Hudson River*, between the city of *Albany*,

By an act of the legislature, a grant was made to A. and six others named, and their executors, administrators and assigns, of the exclusive right of establishing and run-

ALBANY,
Feb. 1808.

DONELLY
v.
VANDEN-
BERGH.

ning stage-
wagons on the
west side of
Hudson's River
from Albany to
the north line
of N. Jersey,
for the term of
seven years;
and if any other
person should

[* 28]

establish a stage
on the same
route, during
that term, he
was made liable
to the penalty
of 500 dollars.

The grantees,
by certain res-
olutions, divided
the whole line,
and assigned a
portion of the
route to each
grantee, who
was to keep
and own a stage
on that part of
the route as-
signed to him,
and receive the
profits. B., one
of the grantees,
with the consent
of two other of
the grantees,
besides running
a stage on the
part of the route
assigned to him,
also run a stage
on the road
which had been
assigned to A.
In an action
brought by A.
against B., to
recover the pen-
alty, given by
the act, it was
held, that the
penalty was
given to secure
the grantees in
the privilege
vested in them,
from the en-
croachment of
strangers, and

[* 29]

that the defend-
ant, being one
of the grantees,

and the northern boundary line of the state of *New-Jersey*, along the most usual route established, or thereafter to be established, as they should judge sufficient, for passengers, &c., and that it should not be lawful for any other person, during the said term, to erect or establish a stage on the said route, under a penalty of 500 dollars, to be recovered by any person who should prosecute for the same: That the defendant, not regarding the act, &c., did, within the term aforesaid, to wit, on the 1st *February*, 1806, at *Catskill*, erect and establish a stage on the said route, and without the consent of the plaintiff and the six other persons, or either of them, whereby, &c.

The defendant pleaded *nil debet*. Upon the trial, the plaintiff offered in evidence, the act, as published in the statute book, printed by the state printer. This was objected to because it was a private act; but the objection was overruled. The act being read, was in substance as stated in the plaintiff's declaration. The plaintiff then proved, that the defendant established, and began to run, a stage-wagon between *Coxsackie* and *Athens*, in *December*, 1805, and carried passengers on the said route; that the witness, in the employ, and under the direction of the plaintiff, run a stage through to *Coxsackie*, going empty from *Athens* to *Coxsackie*, but willing to carry passengers; that the defendant immediately prior to his running to *Athens*, as aforesaid, had run a stage from *Albany* to *Coxsackie*, and the plaintiff exchanged passengers and the mail with the defendant, at *Coxsackie*.

The defendant then moved for a nonsuit; 1. Because the act read, varied from that declared on, which did not set forth the month and day it was passed; 2d. That the declaration did not set forth the second section of the act; 3d. That it appeared, from the testimony for the plaintiff, that the defendant was an acknowledged proprietor in this line of stages, and so not subject to the penalty. The motion was overruled. The defendant then read in evidence the second section of the act, which states, that the plaintiff, and the six other persons, shall forthwith furnish and provide four good and sufficient stage-wagons, and that the fare of each passenger shall not exceed five cents per mile, with the liberty of 14 pounds weight of baggage, &c., that such stage-wagon shall proceed once in every week, during the term, on the said line. Provided, that if the plaintiff, and the six other persons, shall neglect to perform their duties, &c., the act, and their privilege granted, shall cease, &c. The reading of this section was objected to by the plaintiff, and the objection overruled. The defendant then offered to show, that the said grantees had forfeited their right by not complying with the provisions of the second section but this evidence was overruled.

*The defendant then offered to prove, that on the 22d or 23d *December*, 1805, two of the grantees in the act named, licensed the defendant to extend his route of running the stage-

wagon, and carrying passengers and the mail from *Coxsackie* to *Athens*, and that this was previous to any running by the defendant, between those places; but as it further appeared, that these two grantees still continued to own and run 48 miles of the line below *Esopus*, on their own right, and because no right was assigned by them to the defendant, nor did he run as their servant, the evidence was overruled.

The defendant next read in evidence, a *deed*, dated the 3d *April*, 1805, and executed by the plaintiff and one *Abner Miller*, by which, in consideration of 580 dollars, they bargained and sold to the defendant, one stage-wagon and four horses, &c. and also, the right, granted to the plaintiff and others, to run a line of stages, &c., and which they granted to the defendant, from his house to *Albany*, a distance of 24 miles, together with the profits, &c., on condition that the defendant should perform, on his part, the rules, to be from time to time agreed on, by a majority of the proprietors of the said line, and should faithfully carry the mail from his house to *Albany*.

The defendant also offered to prove, that between the 1st *October* and the 23d *December*, 1805, the plaintiff had been frequently delinquent, and that it was a case of necessity, for the defendant to be put on the line from *Coxsackie* to *Athens*. This testimony was objected to, but admitted. The defendant further proved, that the plaintiff had a bond regulating the manner of running stages, proposed to take place the 1st *October*, 1805, and which was intended to be signed by the plaintiff, the said *Miller*, and the defendant, but it was returned without being signed; that only one bond was sent by the plaintiff, and that was, after a meeting of the proprietors at *Goshen*, the 1st *October*, 1805, when the same was written. The defendant next read in evidence, a letter from the plaintiff *to *Dewitt* and *Tremble*, (one of the proprietors in the act,) dated *June* 23d, 1805, in which he stated, that he was willing that their proposals and his should be one, as to carrying the mail.

He further proved, that between *October*, and the 23d *December*, 1805, passengers had been twice carried from *Kingston* to *Catskill*, at the expense of the plaintiff, there being no stage to carry them on; that in the autumn of 1805, the plaintiff presented a bond to the defendant, and urged him to sign it. The bond related to a new arrangement for running the stage, and was written at *Goshen*; that the plaintiff offered to run a stage if the defendant would, but the defendant refused to run under the new arrangement, and said it was too far to run from *Albany* to *Coxsackie*, according to the new plan.

The defendant also proved, that between the 1st *October* and the 1st *December*, 1805, the mail for the northward remained at *Kingston* thirty-six hours, successively, at least once every week, and an additional mail having arrived in that period, was carried up at the same time.

ALBANY
Feb. 1808.

DONNELLY
V
VANDEN-
BERGH.

was not liable for the penalty. That the resolutions assigning to each a distinct portion of the road, was not a division or partition of the franchise or right given by the act. Whether such a privilege or franchise is susceptible of partition, according to the spirit and intent of the act, so as to give exclusive and independent rights in distinct parcels of the road, *dutitur*;

[* 3]

ALBANY,
Feb. 1808.

DONELLY
V.
VANDEN-
BERGH.

The plaintiff then proved, that he had driven the mail diligently and punctually from *Coxsackie* to *Kingston*, except when delayed by the non-arrival of the defendant's stage at *Coxsackie* from *Albany*.

The resolutions at a meeting of the proprietors, at *Kingston*, in *March*, 1803, were then produced, on the part of the plaintiff, and they were, in substance, as follows:—

"That a resolution of the majority should be binding upon all; that the road be divided between the proprietors, and that *Israel Ramsen* and the plaintiff should take the whole road from *Albany* to *Brockway's*, and that *Brockway* should take the route from his house to *Kingston*; that each proprietor should keep a good wagon, &c. &c. and for every default, should forfeit the sum of 10 dollars, to the proprietor aggrieved; that the stage should *run through twice a week, &c., that each proprietor should be entitled to the avails on his assigned route."

* 31]

The judge charged the jury: 1st. That the plaintiff had made out his case in the first instance; 2d. That the permission from the two proprietors did not constitute the defendant an agent or assignee, for he run the route for his own benefit; and it was not competent for any two of the proprietors to assign a particular portion of the road, unless they had previously acquired a right to that portion, by a separation of the joint interests of the whole; and that they could not constitute an assignee, without parting with their interest, which they did not, but continued to hold it; that by the resolutions of *March*, 1803, they had become divested of all right to the road in question; that the deed of the plaintiff and *Miller* constituted the defendant an assignee of the portion of road only mentioned in that deed; that in cases of necessity, the other proprietors might license; for all were bound to see the law executed, but such necessity was not proved here, as the delays at *Kingston* arose from the defendant's not forwarding the northern mail to *Coxsackie* in time; he, however, left the facts to the jury, who found a verdict for the plaintiff.

A motion for a new trial, and also a motion in arrest of judgment, were made in this cause, and argued at the last *August* term.

Van Vechten, for the defendant. 1. This was a private act. It was made solely for the benefit of the individuals named in it. It is a mere naked privilege granted to certain persons to run stages on the public highway, for their own exclusive benefit. A public act regards the whole community, and the judges will take notice of it, *ex officio*; but a private act, which regards particular persons or private concerns, must always be pleaded and proved as any other record. (1 *Black. Com.* 86. 5 *Comyn*, 254. *Parlia. R.* 7.) It is discretionary in the grantees to run the stages or not; there is nothing compulsory

on this head, stated in the declaration. The second section *of the act, to be sure, declares what the grantees are to perform, and provides, that in case of their neglect, the privilege is to be forfeited. Still it is optional with the grantees to avail themselves of the privilege or not. Again, the privilege is confined to a particular route, thereby converting the road so far into a private way for the benefit of the grantees; and is to be regarded rather as a private conveyance, than a solemn act of the legislature. (2 *Black. Com.* 346.)

ALBANY,
Feb. 1808.

DONELLY
V.
VANDEN-
BERGH.

[* 32]

2. The penalty given by the act was for the purpose of protecting the privileges of the grantees from any invasion or infringement by strangers; it has no binding force as between the parties themselves; for they cannot sue each other for this penalty. In two instances, the defendant acted by the license and permission of two of the proprietors; and in another, he became interested in the road, and was equally entitled to protection against strangers. There is nothing in the act to prohibit the grantees from licensing others to use the road, by running stages. Where a person acts under a license, he ceases to be a stranger. By the permission granted by *Tremble & Vanderhoff*, the defendant came into their place, and if they would not have been liable to the other proprietors for the penalty, neither can the defendant be made answerable. Again, the penalty is given for a violation of the rights of the grantees, under the act, as tenants in common. The rights of one tenant in common are as much violated by the defendant, as those of another: but the license given to the defendant, by *Tremble & Vanderhoff*, is an effectual protection to him. If the plaintiff has been injured by their acts, he must seek his recompense from them. Besides, by the deed of 1805, the defendant was made a party in interest, and being a co-tenant with the other proprietors, he cannot be liable to them for a penalty intended to operate only against strangers. It will be said, perhaps, that the road was divided into distinct portions among the several proprietors, and that *Tremble & Vanderhoff*, after this division, had no authority to license the defendant to run a stage on a portion of the road assigned to another *proprietor. But the subject is not susceptible of partition. It is a grant of the entire route, and the act intends a joint and entire performance, for the *proviso* of the act operates against all the parties, in case of a failure on any part of the road.

[* 33]

Again, there is nothing in the act to prohibit either of the grantees from establishing a new stage within the limits of the route. If either of the grantees can do this, and not be liable to the penalty, the defendant, as assignee of such grantee, must be equally protected.

3. This being a private act, the whole of it ought to have been set forth in the declaration; and if the act produced varies from that stated in the declaration, such variance will be fatal. (*Freeman*, 75. *Lord Byron's case*, 19 *Viner*, 502. § 5.)

ALBANY,
Feb. 1808.

DONELLY
v.
VANDEN-
MERGH.

Now the second section of the act is wholly omitted in the declaration.

Next as to the grounds of the motion in arrest of judgment. 1. This being a private act, the date of it ought to have been set forth in the declaration. (1 *Comyn*, 330. *Action on Statute*. I.) 2. It ought to have been averred, that the defendant was not an executor, administrator or assignee of the grantees named in the act. The exceptions in an act creating a penalty, ought always to be negatived; (1 *Term*, 141. 6 *Term*, 559. 1 *Lord Raym.* 120.) and *non constat*, but that the defendant was an executor or administrator of one of the grantees. 3. The particular acts which are supposed to have amounted to erecting or establishing a stage, in violation of the privilege of the grantees, within the meaning of the act, ought to have been alleged. In an action founded on a statute, the plaintiff ought to aver every fact, which may be necessary to to inform the court whether the case is within the statute. (5 *Comyn*, 369. 354. *Pleader*, C. 76. C. 49. *Doct. placit.* 332. 2 *East*, 340. 3 *Term*, 636. 7 *Went. Pleadings*, 120. 132. 208. 238, 239. 242. 292. 296. *as to precedents*.) 4. The part of the route on which the stage was set up by the defendant, ought to have been particularly described and set forth, for the sake of certainty. 5. It ought to have been averred, that the road on which the stage was erected by the defendant, was within the route designated by the act. 6. The whole act is not set forth in the declaration, but only the first section.

[* 34]

**Grosvenor* and *E. Williams*, contra. 1. This may be said to be a public act, inasmuch as it concerns the public convenience, and by its operation, takes away the rights of individuals. In the case of *Jenkins v. The Union Turnpike Company*, (1 *Caines's Cases in Error*, 86.) an act incorporating a turnpike company was considered as a public act, since all the citizens were interested in highways, which contributed to their convenience. But if this be not strictly a public act, it is so much so, that the printed statute-book may be given in evidence. *Buller* lays it down, that where a private act of parliament concerns a whole county, as the act of *Bedford Levels*, for rebuilding *Tiverton*, &c., it may be given in evidence without comparing it with the record: (*Buller*, N. P. 226. *Gilb. Law of Ev.* 12, 13. *Peake's Ev.* 2d ed. 26, 27. 12 *Mod.* 216. See 5 *Term*, 436.) and for the additional reason, that from the notoriety of the subject, and because it is printed by the king's printer, it may be supposed to be generally known. On the same principle, printed copies of things of a public nature, as a printed proclamation for a peace, may be read without being compared with the original. The present act is printed by the state printer, and inserted in the same volume with the public laws.

2. It is not necessary, in an action on a statute, to set forth

the date. The omission of the date is no fault, but if you recite the date, and mistake, the error is fatal. (19 *Viner*, 507. 510. *Hawkins*, ch. 25. § 104. 1 *Lord Raym.* 343.) So the title of a statute need not be set forth. It is objected, that the *second section* of the act is omitted in the declaration. But it is not necessary to set forth the whole of an act. It is sufficient, if so much is recited as concerns the matter in question; and a party may recite such parts as are in his favor, and omit those that make against him. (1 *Lord Raym.* 120. 1 *Comyn*, 331. (1.) *Cro. James*, 139. 1 *Plowd.* 105. *Hob.* 226.) There is no pretence of any misrecital in this case, and it is enough, if the plaintiff has set forth all that is material for him.

3. The act was not personal as to the grantees named. It intended to protect all parties who had the right, against those who had no right. It extended to the *grantees*, and to their *executors, administrators and assigns*. Previous to the license granted by *Tremble & Vanderhoff*, to *the defendant, a partition of the road had been made among all the proprietors. By this act of partition, *Tremble & Vanderhoff* parted with all their right to such parts of the route as were assigned to the other proprietors, and had no authority to give the defendant permission to establish a stage on a part of the road that did not belong to them. If all the grantees could assign their entire privilege to a stranger, then they might also assign to each other; and after an assignment of their right, they must be considered as strangers. If the grantees are not allowed to divide the road between them, then each might run a line of stages through the whole route. Again, if the privilege or right was incapable of partition, as it respected the subject-matter, then a license by two of the proprietors could not affect the rights of the rest, and the defendant acted without a competent authority. At most, the plaintiff could assign no more than an undivided seventh part, which would not justify the defendant in running a stage from *Coxsackie* to *Athens*.

As to the motion in arrest of judgment. If the act in question be a public act, it is not necessary to set forth more than is material to the plaintiff; and if it be considered as a private act, the court must take it to be as it is pleaded, unless the party takes advantage of the omission or misrecital, by pleading *nul tiel record*, for he cannot take advantage of it by demurrer, or in arrest of judgment. (1 *Lord Raym.* 381. 2 *Mod.* 241.) Again, where the misrecital or omission is immaterial, it is cured by the verdict. (19 *Viner*, 509. § 14. 2 *Mod.* 241.) 2. The declaration alleges, that the defendant, without the leave of the plaintiff and the other proprietors, or either of them, their or either of their executors, administrators or assigns, did erect and establish a stage, &c., which is substantially an averment that the defendant was not executor, administrator or assignee. 3. The words in the declaration are, that the defendant did erect and establish a stage, contrary to the form of the statute,

ALBANY,
Feb. 1803.DONNELLY
V.
VANDEN
BERGH

[* 35]

ALBANY,
Feb. 1808.

DONELLY
v.
VANDEN-
BERGH.

[* 36]

and must, in the common understanding of mankind, be intended to mean, that he run a stage *with passengers, and this is sufficient without any further allegation of particular acts. 4 The route is designated in the very words of the act. *Route* has not precisely the same meaning as *road*. The route marks the *termini* or limits, within which there may be different roads. 5. An averment, in the very words of the act, is sufficient; but these defects are cured by the verdict, which aids a title defectively set forth, though not a defective title. (1 *Johnson*, 470. 2 *Wilson*, 255. *Cowper*, 826. *Doug.* 683.)

Van Vechten, in reply. Many private charters may be for public convenience; but public utility or convenience, connected with private interest, does not make an act a public act. If the privilege granted by the act is susceptible of partition, such a division must establish permanent and independent rights in the several proprietors. But the penalty or forfeiture attaches to the whole route or privilege, in case of a failure in any part. It might be necessary for one of the parties to run a stage on that part of the road assigned to another, in order to prevent a forfeiture of the whole. This shows that there could be no partition of the common privilege. The parties, by their agreement, subject each other to the penalty of ten dollars, in case of failure in the respective portions of the road assigned to each. But if, by this agreement, they acquired distinct and independent rights, there was no reason for this penalty; and if, by the failure in any part, the whole became forfeited, the penalty was wholly inadequate and disproportionate. This agreement was, in fact, merely an *arrangement* among the grantees, for their own convenience. Again, if there was a division of the route, why did the proprietors stipulate to meet and adjust their accounts?

The act grants to the persons named, the privilege of running stages on the most *usual* route, &c. *Route* means *road*; and it may be, that the road on which the defendant run his stage, was not the most usual route.

[* 37]

THOMPSON, J. On the argument of this case, several questions were presented to the consideration of the court, both on the motion in arrest of judgment, and for a new *trial. The conclusion, however, to which I have arrived, on examination of these questions, renders it unnecessary for me to consider them all. I shall confine myself to that which goes wholly to exonerate the defendant from the penalty for which he is prosecuted. It is stated, that the defendant offered to prove that he was licensed, by two of the grantees named in the act, to run his stage on the route complained of by the plaintiff. The testimony was rejected, but we must consider it as given, for the purpose of determining its effect on the question before us. This penalty was given by the act to secure the grantees in the

privilege thereby vested in them, against any encroachment by strangers, and not as a security against the acts of each other. As long as they remain tenants in common, they must be subject to the same rules, and like remedies, as other tenants in common. The statute vested a joint interest in them. There is no limitation as to the number of stages to be run, and if each of the grantees had undertaken to run a line, the whole extent of the road, the penalty would not have been incurred.

It is said, however, that previous to the license under which the defendant acted, the proprietors had divided the road among themselves, by which division, those who undertook to license the defendant, had parted with their interest in that portion of the road, for which they gave the license. I should much doubt, whether the privilege or franchise granted by this act is, according to the spirit and intention of the act, susceptible of partition, so as to give exclusive and independent rights, in distinct parcels of the road. Public accommodation and convenience were the objects the legislature had in view, and a common interest to each proprietor in the whole extent of the road, would seem necessary, to prevent confusion with respect to the continuation of the line of stages. If the franchise may be so divided as to vest separate rights, in distinct parts, what would be the consequence of a neglect by any one to perform the duties enjoined by the act? Would his portion of the road only be forfeited, or the whole extent? I *apprehend the latter; and this would subject the other individuals to a forfeiture, without a default. Without determining this franchise to be incapable of division, I do not think the evidence in the case will warrant the conclusion, that any such division has been made. The resolutions of the 14th *March*, 1803, adopted by the proprietors, were relied on, to show such partition. These resolutions must all be taken together, in order to determine their object and effect; and from a general view of them, I consider that nothing more could be intended than to assign to each proprietor the duty to be performed by him, and the proportion of the profits he was to receive; the proprietors retaining in themselves, collectively, a general superintendence and management of the whole route. Upon this construction, they are all reconcilable; but some of them are totally inconsistent with the idea of a separate and independent interest. The first resolution assigns to each individual the distance he was to run. The second provides for the furnishing of able horses and suitable carriages. The third designates the time and manner of running. The fourth provides for any future meeting of the proprietors, and declares, that any acts done by them, or a majority of them, shall be binding on the whole. And the last declares, that each one shall have the profits of the part assigned to him. If, by the first resolution, a separate, independent and permanent interest is vested in the several proprietors, the fourth is absolutely re-

ALBANY,
Feb 1809.

DONNELLY
V.
VANDEW
BERGH

[* 33 ,

ALBANY,
Feb. 1808.

DONELLY
V.
VANDEN-
BERGH.

[* 39]

pugnant to it, by authorizing a majority of them to divest it whenever they please. Upon this construction also, the last resolution would be useless and absurd; for if the road was absolutely divided, it would follow, as matter of course, that each one would have the profits only of the part assigned to him. I conclude, therefore, that those resolutions were intended only as a designation of the duty to be performed by each proprietor, and the proportion of the profits he was to receive, subject to any other modification, which a majority of them should, at any future time, think proper to make. If a permanent *division of this interest was intended, it is a little extraordinary, that releases were not executed. The mode here adopted for tenants in common to sever their interest is unprecedented. If my construction of these resolutions be correct, *Vanderhoff* and *Tremble* had not so far divested themselves of all interest in the part of the road now in question, as to subject themselves to the penalty of the act, had they done what the defendant has. The remedy, if any, must have been upon this agreement for the amount of the profits. The defendant, having acted by their license and permission, cannot be considered as having incurred the penalty. This result would lead to rendering judgment for the defendant, was it authorized by the terms of the case; as it is, a new trial must be awarded.

KENT, Ch. J., declared himself to be of the same opinion.

SPENCER, J. The defendant has moved for a new trial, and in arrest of judgment in this case, and a variety of points have been made, which I shall examine in their order.

1. That the statute on which this action is founded, is a private act, and was not well proved, though read from the statute-book, printed by the printer of the state. (26 Session, c. 20.) This act, so far as it respects the right granted exclusively to *Donelly* and others, to run stage-wagons from the city of *Albany* to the northern boundary of *New-Jersey*, was of a private nature; but as it regarded the public, in providing means to subserve their interest and convenience, and as it went to take from all, under a heavy penalty, a right, before enjoyed by all, to erect or establish any stage on that route, during the term for which the exclusive right was granted, it was, in its nature, public. The objection to receive the printed book, coming forth under the sanction of the state printer, to prove the contents of this statute, is one of a technical kind, for no man can hesitate to yield full faith to the verity of the acts thus published. It is, in general, true, that a private statute must be proved, as other records; there are, however, exceptions to the *rule. Lord Ch. J. *Parker* (1 *Loff's Gilb Ev.* 13.) allowed the printed statute book to be evidence of the truth of a private act, touching the institution of a college,

[* 40]

on account of the notoriety of the establishment; and Lord *Holt* recognizes the authority of those decisions, which admitted in evidence a private act of parliament concerning a whole county, such as the act of *Bedford Levels*, (12 *Mod.* 216.) if printed by the king's printer; so, also, the printed proclamation of the king, and the articles of war, printed by the king's printer, have been, on great deliberation, held to be good evidence. (5 *Term*, 436. *Bull. N. P.* 225, 226.) And they have been admitted as gaining some authority, from being printed by the king's printer, and from the notoriety of the subject in the vicinage. Upon these principles collectively, I think the statute-book, printed by the printer to the state, was properly read in evidence, to prove the truth of the act, on which this suit was brought.

2d. It is objected, that the defendant, being a grantee of another and definite part of the general route, is, therefore, not responsible for erecting and running a stage on that part for which he is sued.

This act, like others, and like the contracts of individuals, must have a reasonable construction, so as to effectuate, not defeat, the intention of parties. The inhibition to establish a stage on the route, must be intended as an inhibition to establish one on any part of the route, otherwise the act grants nothing. From the nature of the thing, the right granted by the legislature to *Donelly* and the six others, is partible; and it appears, that it was partitioned among the grantees. The act contemplated the interest conveyed, as capable of being so assigned, and I know of no principle which forbids it. Not only lands and other things which pass by livery, but things, also, that lie in grant, as rents, commons, advowsons, &c., that cannot pass by grant without deed, whether they be in one county or several, may be parted and divided by parol without deed, (16 *Vin.* 217. part A. *Co. Litt.* 169. *Salk.* 43.) If so, then the assignment to the defendant of a precise portion of the route, can give him no more right than a total stranger, to erect stages on a different part.

*The third objection is already anticipated, and though the original grantees were tenants in common, their subsequent partition divested them, respectively, of any interest beyond such parts of the route as were assigned to them; their license, therefore, to the defendant to erect stages on a part of the route appertaining to another, by their own agreement, was an attempt to impart a right which they did not possess, and, as such, the act is a nullity.

In arrest of judgment, it has been urged, 1st. that the day and month when the statute passed, should have been stated.

The misrecital of a public act, with a conclusion *contra formam statuti*, appears, by the authorities, to be fatal; in the present case, there is no question, in relation to variance, and the omission to state the day and month is not material. A

ALBANY,
Feb. 1803.

DONELLY
V.
VANDEN-
BERGH.

[* 41]

ALBANY,
Feb. 1808.

DONELLY
v.
VANDEN-
BERGH.

[* 42]

reference to the cases cited on the argument shows, that this is the better method of referring to a statute. 2d. That the declaration does not negative the exceptions in the first enacting clause of the act. The right to erect and run stages is given to *Donelly* and six others, their executors, administrators and assigns; and the penalty is given against every other person or persons, who shall erect or establish a stage or stages on the route. The objection is, that it is not alleged, that the defendant is not an assignee, executor or administrator. It is, undoubtedly, a rule of law, that an exception contained in an enacting clause, must be negated by the plaintiff, in his declaration. (1 *Term*, 144. 6 *Mod.* 559. 7 *Mod.* 27.) In the present case, after alleging, that the defendant erected and established a stage on the route, the declaration charged it to have been done without the consent or approbation of the grantees in the act named, or either of them, or of their or either of their executors, administrators or assigns, legally had or obtained, contrary to the form of the statute, &c. This, I think, a full allegation, that the defendant is not an assignee, executor, administrator, and that he derived no right under the grantees, or either of them. In an action on a penal statute, *it is not necessary to negative, specifically, the exceptions; it may be done generally, as in the cases mentioned by Justice *Buller*, in *Spieres v. Parker*. (1 *Term*, 141.) In actions for penalties on the game laws, it is generally alleged, that the defendant was not qualified according to the laws then in being. The third objection is, that the particular manner of erecting and establishing a stage on the route ought to have been stated. This objection comes after verdict, and if the offence is stated to a common intent, it is sufficient. (*Bluet v. Nees*, *Com. Rep.* 225.) It was matter of evidence what did or did not constitute an erecting or establishing a stage on the routes. A verdict will not mend the matter, where the *gist* of the action is not laid in the declaration; (*Cowp.* 825. *Avery v. Hoole*.) but it will cure ambiguity. A verdict will supply, whatever of necessity must be given in evidence. (4 *Burr.* 2018.) The same answer applies to the fifth objection, that the particular route is not set forth; it must be presumed, after verdict, that the route on which the defendant established his stage, was the route to which the grantees had an exclusive right. I think, on none of the grounds, urged by the counsel for the defendant, can there be a new trial, nor ought the judgment to be arrested.

VAN NESS, J., having formerly been counsel in the cause, gave no opinion.

New trial granted.

CHEETHAM *against* LEWIS.ALBANY.
Feb. 1808.CHEETHAM
v.
LEWIS.

THE declaration in this cause was for a *libel* published the 18th day of *November*, 1803. The declaration was entitled of *November* term, generally, and the memorandum was of the second *Monday* of *November*, being the 14th day of that month, or the first day of the term. *There was a general imparlance to *November* term, 1805, when the defendant demurred to the declaration, and the plaintiff joined in demurrer.

Where the declaration in a suit for a *libel*, was entitled of *November* term, [* 43]

generally, but the memorandum was of the second *Monday*, or the 14th day of *November*, being the first day of the term, and the libel was alleged to have been published on the 18th day of the same *November*; it was held, on demurrer, to be bad; such a mistake would not have been cured by a verdict. The suing out of the writ is the commencement of the action, and the cause of action must be stated to have arisen prior to the commencement of the suit. (a)

D. B. Ogden and *Hoffman*, in support of the demurrer. The declaration must always be entitled after the cause of action accrued, and not of the term generally. (1 *Tidd*, 3d ed. 368.) Where the cause of action arises after the first day of term, there should be a special memorandum of a subsequent day. The only question is, whether the defendant can take advantage of this fault on a general demurrer. In *Venables v. Daffe*, (*Carth.* 113.) there was a general memorandum, and the defendant moved in arrest of judgment, because the cause of action arose after the commencement of the term, and the judgment was arrested. Now, it is a general principle, that whatever is sufficient to arrest judgment, would, on a general demurrer, be sufficient to overturn the action. (3 *Black. Com.* 394.) In the case of *Lowry v. Lawrence*, (1 *Caines*, 69.) though decided on a special demurrer, the court considered the objection as substantial and fatal. It is an established rule, that the plaintiff must state a cause of action, anterior to the commencement of his suit. This is essential, and the want of it will be fatal on a general demurrer.

Van Wyck, contra, contended, that the objection was merely formal, and that the defendant could only take advantage of it, on a special demurrer.

(a) *Bird v. Caritat*, 2 *Johns.* 342. *Bronson v. Earl*, 17 *Johns.* 63. *Amory v. M'Gregor*, 12 *Johns.* 257. *Waring v. Yates*, 10 *Johns.* 119. *Hogan v. Cuyler*, 8 *Cow.* 203. *Fayne v. Lansing*, 2 *Wend Rep.* 525.

Per Curiam. It is settled, that the suing out of the writ is the commencement of the suit, (1 *Caines*, 69. See also 1 *Johnson*, 342. *Bird & others v. Caritat*.) and by the record in the present case, it appears, that the action must have been commenced as early as the second *Monday* in *November* term, 1803, and that the cause of action did not arise until the 18th of *November*, in the same term. The action appears, therefore, to have been commenced before the cause of action accrued. (1 *Tidd's Prac.* 368.) Though generally, the day may not be material, yet this must always be understood with this limitation, that it be laid to be before the commencement of the suit. In *Venables v. Daffe*, (*Carth.* 113.) this mistake was held not to be cured by verdict, and to be bad in arrest of judgment; and from the cases of *Ward v. Honeywood*, (*Doug.* 61.) and

[* 44]

ALBANY,
Feb. 1866.

HALLETT
v.
WYLIE.

Dickinson v. Plaisted, (7 Term, 474.) it appears to be equally bad after verdict, since the statute of 4 Anne, c. 16. and would be ground for a writ of *error*. It is, therefore, error in substance, and may be taken notice of on a general demurrer.

Judgment for the defendant, with liberty to the plaintiff to amend his declaration, on payment of costs.

HALLETT against WYLIE.

In an action of debt, for rent, due on the lease of a house, it was held, that the destruction of the premises by fire, would not excuse the lessee from the payment of the rent, according to his covenant.

THIS was an action of *debt* for one year's rent, due the 1st May, 1805. The defendant pleaded *nil debet*. The cause was tried before Mr. Justice *Livingston*, at the *New-York* sittings, in *December*, 1806. Upon the trial, the plaintiff produced a deed or "memorandum for a lease, between *Elizabeth Hallett* and *Henry Wylie*, merchant, of the city of *New-York*, made and entered into the 26th of *February*, 1804," by which the plaintiff agreed to let on lease to the defendant, for the term of four years from the first day of *May*, then next, the house, &c. for 260*l.* per annum, payable quarter-yearly, the first payment to be made on the 1st of *August*, 1804. All taxes and assessments were to be paid by the defendant, who was to keep the internal part of the premises in good and sufficient repair, without pulling down or altering any part thereof, and to conform to such regulations for cleansing the premises, as the corporation of the city should direct, &c. And the defendant, on his part, agreed to take the premises on the said terms and conditions: and for the true performance thereof, the parties thereunto subscribed their hands, and affixed their seals. The due execution of the deed was admitted; and that the defendant had entered and occupied the premises under it. The house, except the walls, was consumed by fire, on the 21st of **December*, 1804, and thereby rendered uninhabitable, against the will of the defendant. The walls were so injured by the fire, that they required repair, before the house could be made tenantable. The plaintiff, though she had notice of the effect of the fire, did not repair the house; and the defendant has never occupied the premises since the accident. Upon these facts, the jury, under the direction of the judge, found a verdict for the amount demanded in the declaration of the plaintiff, with damages for the detention of the debt, subject to the opinion of the court, whether the plaintiff, on the above facts, was entitled to recover, and with liberty to either party, if dissatisfied with the judgment of the court, to turn the case into a special verdict.

] * 45]

Harrison, for the plaintiff, said, that he considered the law as

so clearly settled, on the question made in this case, that he should content himself with citing a few authorities to the court; *Alley*, 27. *Strange*, 763. *Ld. Raym.* 1497. 1 *Term*, 311. 705. 3 *Anstruther*, 687.

ALBANY,
Feb. 1808.

HALLETT
v.
WYLIE.

Colden and *Hoffman*, contra. The strict principle of law, that where there is an express covenant to pay rent, the party must perform the covenant, though the premises are destroyed by fire, is not denied. The rule is generally admitted to be a rigid one, and the present case is certainly very hard on the defendant. The court will, therefore, feel disposed to lean against the application of the rule, unless the plaintiff shows most clearly and unequivocally, that here is an express covenant to pay the rent.

In all the cases cited, there was an express covenant to pay the rent during the term. Here is no lease, but only a memorandum for a lease: (1 *Term*, 735. 5 *Term*, 163.) And though there is a reservation of rent, the paper contains no express covenant to pay it. It is a general rule, founded in reason and equity, that where the thing is destroyed without any fault of the tenant, the rent shall abate; unless there be a special covenant to pay the rent. (6 *Bac. Ab.* 49, 50. *Rent. M.* 2.) In the case of *Brown v. Quilter*, (*Ambler*, 619.) Lord *Northington*, Ch. J., observed, "that the justice of the case was so clear, that a man should not pay *rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that he was much surprised that it should be looked upon as so clear a thing, that there could be no defence to such an action at law; and that such a case should not be considered as much an eviction, as if it had been an eviction of title; for the destruction of the house was the destruction of the thing."

[* 46

Again, in this agreement there is a covenant on the part of the lessee, that he will repair the internal part of the house; and if a covenant is to be raised by implication against the defendant, to pay the rent, it is fair to imply a covenant on the part of the plaintiff, to repair the external part of the house; and the jury have found that he has refused to make any such repair. It would be impossible to repair the inside, until the external walls were rebuilt. There is, then, a condition precedent to repair the external walls, to be performed by the plaintiff.

Harison, in reply. There is no peculiar hardship in this case. The defendant must have known the rule of law, and should have protected himself by the terms of his lease. It is a calamity to be borne by both parties. The plaintiff loses his property, and the defendant the use of the house. The agreement was not to execute a future lease, but was a present contract, under which the defendant took possession of the prem-

ALBANY,
Feb. 1808.

HALLETT
v.
WYLIE.

ises. There is no ground for an implied covenant on the part of the plaintiff. In cases where the lessee covenants to repair, accidents by fire excepted, it never has been imagined that the lessor, by any implied covenant, was bound to repair, in case the premises were destroyed by fire. And if there were any covenant implied, it must be an independent covenant. In the case of *Hare v. Groves*, (3 *Anstruther*, 687.) Chief Baron *Macdonald* recognizes the rule of law, as laid down in the cases which have been cited, and seems disposed to adopt it in equity, considering the ground of Lord *Northington's* opinion as very questionable.

* 47]

*VAN NESS, J., delivered the opinion of the court. This is a hard case upon the defendant; and if the court could, consistently with settled and established principles, relieve him against the payment of the rent in question, we should most willingly do it. But it cannot be done, without overturning a series of decisions to which this court is bound to conform. We sit here "*jus dare*," not "*jus facere*." We think it may safely be said, that there is not a case in the books, where the destruction of the demised premises by fire, has been held to excuse the tenant from the payment of the rent on an express covenant; but, in every case, where a defence on that ground has been attempted, it has failed. (2 *Str.* 763. *Monk v. Cooper*. 2 *Ld. Raym.* 1477. *Alleyn*, 27. *Paradine v. Jane*. 1 *Term*, 705. *Doe v. Sandham*. 3 *Burr.* 1638.) The law on this point has, in one of the late cases in *England*, been considered so fully established, that the court would not even hear an argument respecting it. (1 *Term*, 310.) We have found but one case, and that was in chancery, where the law on this subject has ever been doubted. But there the circumstances were special, and presented a case different from those to which the general rule has been applied. (*Ambler*, 619. *Brown v. Quilter*.)

On the argument, the counsel for the defendant, admitting the general rule to be against them, endeavored to take this case out of it. It was said, that the writing upon which this suit is brought, is not a lease, but a mere agreement for a lease, and that even if it were the former, it contained no express reservation of rent. Whether this contract is to be considered as a lease, or only an agreement for a lease, must depend upon the intention of the parties, to be collected from the whole of the instrument. (1 *Term*, 735. *Goodtule v. Way*, 5 *Term*, 163. *Roe v. Ashburner*.) There is nothing in it to show that the parties contemplated any further assurance. The words made use of, imply a present demise, and the fact of the defendant's entry under the agreement, and continuing in the occupation of the house, *&c., from *May* to *December*, when the fire happened, is strong evidence to show, that in the understanding of the parties, it was, in fact, a lease; and

[* 48]

the period for which the premises were demised, as well as the terms upon which they were to be held, are definitely and accurately stated. Nothing, in our opinion, can be clearer, than that this is, to all intents and purposes, an executed contract. If the defendant had filed a bill for a specific performance, there can be no doubt that the chancellor would have told him, he had already the legal estate, and that he could not interfere. As to the idea that there is no express reservation of rent in this agreement, if that were necessary, the defendant's counsel are certainly mistaken in point of fact. The premises are demised "*at the rent of 260*l.* per annum, payable quarter-yearly, during the term of four years, the first payment of 65*l.* to be made on the 1st of August, 1804,*" &c. And, at the conclusion of the contract, the defendant "*agrees to take the said house and premises, on the terms and conditions aforesaid.*" There is, therefore, in contemplation of law, not only an express reservation of rent, but a covenant to pay it. No particular technical words are requisite to make a covenant. Any words which import an agreement, between the parties to a deed, will be sufficient for that purpose. (1 *Burr.* 290. *Lant v. Norris.* *Bul. N. Pri.* 156. *Cro. Jac.* 399.) (a)

There was another point made on the argument, by the defendant's counsel, which I will briefly notice. It was said, that the contract between the parties implied a covenant, on the part of the plaintiff, to rebuild the outer walls of the house; and that the court ought to hold the performance of that covenant, to be a condition precedent to the plaintiff's right to recover the rent. The agreement, by no means, implies a covenant, on the part of the lessor, to rebuild; and if it did, it will be found, on examining some of the cases before cited, that, even where the lessor was under a covenant to rebuild, in case the house should be destroyed by accidental fire, and he neglected or *refused to do so, the lessee was, notwithstanding, held liable for the payment of the current rent. The court are, therefore, of opinion, that the plaintiff must have judgment.

Judgment for the plaintiff.

(a) *Jackson v. Delacroix*, 2 *Wend. Rep.* 433 *Jackson v. Kipelbrack* 10 *Johns.* 336

ALBANY,
Feb. 1846.

HALLETT
V.
WYLIE.

ALBANY,
Feb. 1808.

LIVINGSTON

v.

COLUMBIAN
INS. COMPANY.

LIVINGSTON against THE COLUMBIAN INSURANCE COMPANY.

A vessel and freight were insured by the same underwriters, by two different and open policies of insurance, on a voyage from N. York to the river La Plata, and at and from thence to a port in Europe. The ship arrived at Buenos Ayres on the 13th Feb. 1802, under a charter-party, for freight, and delivered the cargo, and the master received a part of the freight money.

* 50]

The ship was detained by an embargo, and other delays, until the 1st October, 1802, when she sailed for Havre, in France, and arrived there in December, 1802. An abandonment of the ship and of the freight was made at the same time, but not accepted. In an action on the policy on the freight, it was held, that the plaintiff was entitled to recover as for a total loss. Freight is a distinct subject of insurance, and a previous abandonment of the ship to one insurer, will not prevent the insured from recovering the freight insured by another. Whether the abandonment of the ship deprives the insurer of freight of his salvage, and whether the insurer on the ship is to account to the insurer of the freight, for the freight earned subsequent to the abandonment; Quere.

THIS was an action on an open policy of insurance, on freight, of goods laden on board the ship *Olive*, on a voyage from New-York to the river La Plata, and at and from thence to a port in Europe. The sum of 18,000 dollars was insured at a premium of 12 1-2 per cent. The policy was dated the 17th day of September, 1801.

At the trial, the preliminary proofs and policy were admitted, and also, that the plaintiff abandoned on the 29th June, 1802. It was proved, that the freight of such a ship as the *Olive*, would have been worth 18,000 dollars, for such a voyage. On the 10th August, 1801, the ship, which belonged to the plaintiff, was at Bourdeaux, where she was chartered by an agent of the plaintiff, to Mr. Hammon, of Hamburgh, and by the charter-party she was to sail from Bourdeaux to New-York, from thence to Rio de la Plata, and from thence to Hamburgh. Eighteen thousand dollars were to be paid for the whole voyage, half at Rio de la Plata, and the other half at Hamburgh, or other port of discharge. Sixty lay days were allowed at Rio de la Plata. The ship sailed from Bourdeaux, and arrived at New-York, under the charter-party. Before she left New-York, the charter-party was ratified by the agent of Hammon and the plaintiff, on the 6th October, 1801, with some alterations. Ten additional lay days were to be allowed at Rio de la Plata, and half the freight to be paid at that place. The ship sailed on the voyage insured, on the 13th October, 1801, and arrived at Buenos Ayres, on the 13th February, 1802. The cargo was delivered to the supercargo, in a few days after her arrival; and the captain received about 4,000 dollars, in part of the freight due at Buenos Ayres, and took security for the residue. There was an embargo at Buenos Ayres, in March, 1802, on all merchant vessels, which continued until the 1st October, 1802. In the beginning of August, the captain had leave to load, but did not obtain leave to depart, nor did he depart till the 1st October, when he sailed with a cargo for Havre in France, and arrived there in December, 1802, and delivered his cargo according to the charter-party, and received the freight for the same, as well as the balance of freight due at Buenos Ayres.

A suit was instituted at Havre, in the name of the plaintiff, against Mr. Hammon, to recover damages for the detention of the vessel at Buenos Ayres, by the embargo, which suit was determined against the plaintiff, on the ground that the vessel

was not damaged by the embargo. Whether the abandonment of the ship deprives the insurer of freight of his salvage, and whether the insurer on the ship is to account to the insurer of the freight, for the freight earned subsequent to the abandonment; Quere.

was detained by an embargo. The balance of freight due at *Buenos Ayres* was not received until after the suit. The captain laid out his freight money in purchasing goods in *France*, with which, and some other goods on freight, he arrived at *New-York* with the ship in *April*, 1803; and on the 21st *April*, 1803, the plaintiff informed the defendants of the arrival of the ship, and that the first moiety of the freight had been paid.

ALFANY,
Feb. 1803.
LIVINGSTON
V.
COLUMBIAN
INS. COMPANY

By his instructions from the plaintiff, the captain was not to deliver the cargo at *Buenos Ayres*, until he had received half the freight, or the same was safely secured; he was also directed to receive the demurrage before he left *Buenos Ayres*. If the freight was paid, he was to invest the amount in merchandize, and ship it to *New-York*.

*The captain wrote from *Buenos Ayres* to the plaintiff, the 28th *April*, 1802, that the supercargo refused to pay the freight without a deduction, and that the cargo was damaged and would not pay the freight. On the 10th *May*, 1802, he again wrote that the supercargo would neither pay freight nor demurrage, but insisted on a deduction, on account of the peace. In *November*, 1802, the plaintiff wrote to *France*, that in *August*, the ship was in *Buenos Ayres*, and, as far as he could learn, without any cargo on board.

[* 51]

One witness testified, that the embargo commenced in *January*, 1802, and continued until the 15th *March*, and that it was again renewed. It was afterwards decreed, that all vessels, not exceeding 500 tons burthen, and which had arrived before the 14th *April*, should be at liberty to load after three months. On the 26th *July*, 1802, there was no general embargo, but only insuperable difficulties and delays.

It appeared, that the defendants underwrote an open policy of insurance for the plaintiff, on the ship, for 10,000 dollars, on the same voyage; and that on the 29th *June*, 1802, the plaintiff abandoned both the vessel and freight; but that neither abandonment was accepted. In a suit brought on the policy, on the ship, a verdict was found for the plaintiff for a total loss, the question whether there was an embargo or not, having been left to the jury.

It was admitted, that on the 29th *June*, 1802, an embargo existed at *Buenos Ayres*.

A verdict was taken for the plaintiff as for a total loss, subject to the opinion of the court. The adjustment of the balance, in case of either a total or partial loss, was to be made by persons to be appointed by the court.

Hoffman, for the plaintiff. The embargo is a peril within the policy, and the insured may abandon and recover for a total loss. (*Marshall*, 483.) To recover on a policy, on freight, nothing more is necessary, than that the owner's right to

ALBANY,
Feb. 1808.
LIVINGSTON
V.
COLUMBIAN
INS. COMPANY.
[* 52]

the freight had commenced ; that is, where the ship has actually begun to earn freight. (*Marshall*, 76.) The moment the ship sails on the voyage, there is an inception of the contract *for freight. It was so decided in the case of *Thompson v. Taylor*, (6 *Term*, 478.) though it is not there said, that it was an open policy ; but *Parke* (*On Insurance*, 36. a.) expressly states it to have been an open policy. In the case of *Horn-castle and others v. Stuart*, (7 *East*, 400.) which is perfectly analogous to the present, it was held, that the charter-party made an entire contract, and that the policy attached at *Dominica*, while the vessel was delivering her *outward* cargo, though no part of the *homeward* cargo was shipped.

The right to freight, in this case, for the whole voyage, attached the moment the vessel sailed from *New-York*. It was this inchoate right to freight, that the defendants insured, and which they engaged should not be defeated, by any of the perils mentioned in the policy. It makes no difference, whether the policy was *open* or *valued*, or whether there were goods on board or not at the time, provided the policy attaches by the inception of the voyage.

It may, perhaps, be said, that the plaintiff, having abandoned the ship, had no right to claim the freight ; but, notwithstanding the *English* adjudications on this point, it has been differently decided in this court. (3 *Caines*, 16. 1 *Johnson*, 433.) In a case like the present, of a *technical* total loss, by *embargo*, no question as to *pro rata* freight can arise, or enter into the calculation of the total loss.

C. I. Bogert and *Harison*, contra. It has been decided, that after an abandonment of the ship, all subsequent earnings belong to the insurer on the ship ; and it would be unreasonable to say, that the insurer, to whom those earnings have been ceded, should afterwards be obliged to pay the insured, in an action on the freight policy. In *England*, the subject has been fully discussed, and it is settled, (4 *East*, 34. 5 *East*, 388. 3 *Bos. & Pull.* 479.) that by an abandonment of the ship, the insured loses all claim on the insurer, for the freight insured. In the case of *Davy v. Hallett*, (3 *Caines*, 16.) the point was not fairly before the court. It is true, that in *Mumford v. Hallett*, (1 *Johnson*, 433.) which was a case of insurance on profits, the court seemed to consider it as analogous to an insurance on freight. But another question of importance arises in this case ; *Was there a right to freight, on which the policy could attach, at *Buenos Ayres* ? The risk or voyage, in this case, was divisible. (*Marshall*, 192. 564.) By the charter-party, 9,000 dollars were to be paid at *Buenos Ayres*, and the residue on the delivery of the homeward cargo. On the 29th *June*, there was no cargo on board, nor any ready to be shipped. The earning of freight must be prevented by some of the perils mentioned in the policy, and not by the acts of the party. In

[* 53]

all the cases cited, the loss of freight was not occasioned by any act or neglect of the party, but by the perils described in the policy. The cargo must be on board, or ready to be shipped. (*Marshall*, 192. 1 *Bos. & Pull.* 172.) Here half the freight had been earned and paid. The vessel lay a considerable time waiting for a cargo, which the merchant at *Buenos Ayres* was unable or unwilling to provide. There was no interruption or delay occasioned by the embargo; and *non constat*, that the vessel could have sailed a day sooner, if there had been no embargo. The plaintiff ought to have shown that a cargo was on board, or ready to be shipped, at the time of the abandonment. Though in all cases, the risk may not be divisible, yet, where there are separate cargoes, and separate freights, the voyage, as it respects the abandonment, may be considered as divisible.

ALBANY,
Feb. 1808.
LIVINGSTON
V.
COLUMBIAN
INS. COMPANY.

J. Radcliffe, in reply, contended, that the right of abandonment, as to the distinct interests on separate policies, had been well settled by this court, in the cases of *Davy v. Hallett*, and *Mumford v. Hallett*, and that any other rule, where the different interests were allowed to be insured, would be unjust and absurd. In the present case, the defendants were insurers of both vessel and freight. The cases, as to a division of the voyage or risk, relate merely to a return of premium. Here was a contract for an entire voyage, and an entire freight. The vessel arrived in *February*, the embargo was laid in *January*, and renewed again in *March*. By the charter-party, the vessel was allowed sixty lay days, which had not expired when the embargo took place, so that no cargo could have been put on board, had it been ready. It is evident, from the *suit in *France*, relative to the demurrage, that the detention was considered as occasioned by the government of *Buenos Ayres*, and not by the act of the party. By the rule established in this court, the abandonment has relation back to the commencement of the voyage. The plaintiff may, therefore, claim a total loss of the whole freight, deducting only the amount actually received.

[* 54]

KENT, Ch. J., delivered the opinion of the court. This was an insurance for an entire voyage, from *New-York* to the river *La Plata*, and from thence to *Europe*. The voyage was not livisible, and the risk had clearly attached on the whole freight, at the time of the abandonment. The charter-party gave an entirety to the contract of freight. The cases of *Thompson v. Taylor*, and of *Horncastle v. Stuart*, (6 *Term*, 478. 7 *East*, 400.) are in point, and decisive, that the risk on the whole freight had attached, when the alleged peril took place.

That there was an embargo or detention, arising from the act of the *Spanish* government, at *Buenos Ayres*, and that the same existed when the abandonment was made, is a fact, which I do

ALBANY,
Feb. 1803.
LIVINGSTON
V.
COLUMBIAN
INS. COMPANY.

not think is to be drawn in question, upon the consideration of the present case. If it was really a doubtful point, it ought to have been distinctly submitted to the jury upon the trial. The case, in one part of it, asserts the existence of the embargo, and we have no reason to question the verdict upon this ground.

These two points, viz. the commencement of the risk, and the existence of the embargo, being established, it is difficult to perceive any real objection to the plaintiff's right to recover. The abandonment of the ship had no effect to destroy the right of recovery upon this policy. The court has already declared this opinion, in the cases of *Davy v. Hallett*, (3 *Caines*, 16.) and *Mumford v. Hallett*, (1 *Johnson*, 433.) Freight is a distinct subject of insurance, and is to be considered as disconnected from the ship, in respect to the policy. Whether the abandonment of the ship deprives the insurer on freight of his salvage, or the hope of any indemnity, I need not say, although the better opinion is, that *it does. The effect of the abandonment of the ship, is immaterial. The plaintiff had a right to abandon in each case, and the defendants, by their policy, have treated the freight, as detached altogether from the ship. The plaintiff, therefore, calls for the value of his ship from the one insurer, and of his freight from the other; and whether the insurer upon the ship is, or is not, to account to the insurer upon the freight, for freight, which may be subsequently earned or recovered, is a distinct question, which is not now before us: That is to be left to be decided between those two sets of insurers, and the plaintiff has no concern with the question. For the reasons already given by this court, in the cases referred to, we must not confound the two subjects of insurance. The abandonment of the ship is not to be likened to a voluntary sale of the ship. It is an act arising out of the insurance, and imposed by necessity. To hold that the plaintiff may not abandon his ship, without destroying his remedy upon his freight policy, appears to me to be denying that freight is a distinct subject of insurance. It would be truly an anomaly in the law of insurance, if, when both ship and freight are separately insured, you cannot abandon the one subject, without thereby defeating your right on the other policy. But after the opinions which have already been given in this court, we consider the question as settled, and trust that it will no more be disturbed. The only remaining point is, upon what principles shall the loss, in the present instance, be liquidated.

This was termed an open policy, but whether a policy on freight, like a policy upon profits, (1 *Johnson*, 439.) must not, in all cases, where the value is not ascertained by the agreement of the parties, be deemed to be of the value of the subscription, we need not now inquire, since the charter-party has, in this case, fixed the entire freight at 18,000 dollars, of which one moiety only has been received by the plaintiff. He is,

therefore, entitled to recover the remaining moiety, upon the ground of a total loss, and the verdict is to be adjusted accordingly.

Judgment for the plaintiff.

ALBANY.
Feb. 1808.

TILLOTSON
v.
CHEETHAM

*TILLOTSON against CHEETHAM.

[* 56]

THIS was an action for a libel, published by the defendant, in a paper called the "*Republican Watch Tower*." After an interlocutory judgment for a want of a plea, a writ of inquiry of damages was issued, and was executed by the sheriff of the county of *Albany*, on the 22d day of *October*, 1806, at a circuit court, before Mr. Chief Justice *Kent*. On the assessment of damages, the plaintiff's counsel produced a newspaper as the one described in the declaration, dated the 17th *July*, 1805, entitled "*Republican Watch Tower*," and offered to read it to the jury, as containing the libel charged in the declaration. (a) This

In an action for a libel, the defendant suffered a judgment by default, for want of a plea: and the writ of inquiry of damages, was executed before a judge, at the circuit. On a motion to set aside the assessment of

[* 57]

(a) The words, as stated in the declaration, were as follows: "*Lord Melville has been disgraced by the British house of commons, (no mirror of purity,) and, however reluctantly, has been driven from the bounties of the crown. Let me ask for what—for bribery and corruption? No—for applying to his own use the money of the public? No—for with this he has not been charged—his offence, and an offence it undoubtedly is, consists in conniving at Mr. Trotter's application of the public money to the advancement of his private ends. Is the offence of his lordship, confessedly great, equal in mischievous example, in downright turpitude, in its demoralizing consequences, to the conniving of a secretary or treasurer of the state, or any higher official character, at the bribing of no inconsiderable portion of the legislature? I ask this question hypothetically, for I do not know, nor do I assert, that although many of the members of our legislature were unquestionably bribed, the secretary and treasurer of the state winked at the bribery—but this I affirm, and hold myself accountable to the gentleman and to the law for the affirmation—that before the bribery was unfolded and substantiated in the assembly, by incontrovertible testimony, the secretary and treasurer of the state aided and abetted by frequent private consultations, by public vindications and otherwise, the persons who were bribed, and that after the bribery was so disclosed and established in that house, they succored and encouraged the legislators who were guilty of the offence. Admitting, then, for the sake of argument, that the secretary and treasurer of the state did know, or had reason to believe, that the members of the legislature had been bribed to vote for the incorporation of the bank, would they appear to the eye of the community, to the eye of an uncorrupted legislature, to the eye of the law, less criminal than Lord Melville? When the safety of the nation is at stake, suspicion is just ground for inquiry.*"

damages, it was held, that by the interlocutory judgment, the fact of the publication of the libel, and the truth of the innuendoes, were admitted; that the defendant is not to be allowed to call the attention of the jury to the other paragraphs contained in the publication, to show a different meaning of the libellous words, than that set up by the plaintiff; and that the defendant could not offer in evidence, in mitigation of damages, the recovery of damages in favor of the plaintiff, against the defendant, in another action for a libel, and which formed one of a series of numbers published in the same paper, and which

contained the same libellous words, as were charged in the declaration in this suit

ALBANY,
Feb. 1808.

TILLOTSON
V.
CHEETHAM

tiff's political conduct, and the badness of his political character; but the chief justice decided, that, circumstanced as the case then was before the jury, the political conduct of the plaintiff was not a proper subject of inquiry or comment. The defendant's counsel then offered in evidence, in mitigation of damages, a record containing an assessment of damages to 1400 dollars, in favor of the plaintiff, against the defendant for a libel published in the same paper on the 3d day of *July*, 1805, (See 2 *Johnson*, 63.) and they offered to prove that the libellous words, charged in both declarations, were contained in a series of numbers published by the defendant in a public newspaper, entitled, "*Republican Watch Tower*," and all relating to the manner and the means employed, in procuring the incorporation of the *Merchants' Bank*. This testimony, being objected to by the plaintiff's counsel, was rejected by the chief justice. The defendant's counsel then read to the jury, the remaining part of the paragraph, and insisted that the whole, taken together, did not amount to the charge alleged in the declaration.

[* 58]

In his charge to the jury, the chief justice observed, that the defendant, by not pleading, had admitted that he *was the printer and publisher of the libel, as charged in the declaration, and the truth of the *innuendoes*, as alleged by the plaintiff, and that the defendant was estopped from calling the attention of the jury to any other part of the paragraph which contained the libel, to show a different meaning of the libellous words, from that set out by the plaintiff. He further remarked, that if the defendant was not precluded by his default, yet, in his opinion, the intent of the defendant to fix upon the plaintiff the charge, as alleged in the declaration, was obvious from the whole tenor of the publication. He further observed, that the charge contained in the libel, was calculated not only to injure the feelings of the plaintiff, but to destroy all confidence in him as a public officer; and, in his opinion, demanded from the jury exemplary damages, as well on account of the nature of the offence charged against the plaintiff, as for the protection of his character as a public officer, which he stated as a strong circumstance for the increase of damages; that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious effect which a publication of this kind was calculated to produce in society. The jury assessed the damages at 800 dollars.

On an affidavit containing the above facts, at the last term, a motion was made to set aside the inquisition for irregularity.

Foot and *E. Williams*, for the defendant. By a default, a substantial cause of action is not admitted, if no cause of action really existed. Some things are admitted, but the plaintiff must prove others. Thus, in trespass *de bonis asportatis*, on a judgment by default, or *non sum informatus*, the plaintiff is

bound to prove, on the writ of inquiry, the value of the goods, though not the property. (*Cro. Jac.* 220.) The defendant admits no more than a right to nominal damages; and if the plaintiff means to get more, he must produce further proof to the jury. (3 *Term*, 301.) Again, it was important that the paper containing the publication should be produced, in order to show a variance between it and the paper set *forth in the declaration, as well as to explain the meaning of the words charged, by the subsequent words in the same paragraph. By not admitting the whole paragraph to be read, the defendant was prevented from showing, that he did not mean to charge the plaintiff with bribery or corruption. The truth of the *innuendoes* ought to have been determined by the jury; and the defendant, by his default, was not precluded from showing the *innuendoes* to be incorrect. The intention of the writer, and the fair meaning of the *innuendoes*, are proper points for the jury to decide. If so, the inquisition ought to be set aside, for the misdirection of the judge.

In *Messin v. Massarene*, (4 *Term*, 493.) which was an action of *assumpsit* on a foreign judgment, in which the defendant suffered a judgment to pass by default, the court would not allow a final judgment to be entered up, without executing a writ of inquiry; and it was held that the defendant might go into the consideration of the original judgment, on which the action was brought. Again, it was competent to the defendant to go into evidence in mitigation of damages, and for that purpose to show a former recovery for the same cause of action. Though published on different days, yet they were all a connected *series* of numbers relating to the same subject, containing the same charge, and published in the same gazette. The plaintiff in this suit is certainly not entitled to the same damages, as if he had not already recovered a heavy sum for the same cause of action. The charge of the judge, also, was incorrect, in stating that the plaintiff was entitled to exemplary damages, on account of the injurious tendency of such publications to the community. In a private action, the party can recover only for the private wrong; he has no concern with the public offence, for which the defendant must atone, on an indictment.

Colden, contra. 1. By suffering a judgment by default, the defendant admits the publication, or cause of action, to be, as set forth in the plaintiff's declaration; and the only thing for the jury to inquire into, is the amount of damages. The defendant is in the same situation as if he had confessed the action, or pleaded *non sum informatus*. (3 *Term*, 301. 2 *Selton*, 22.) The case cited from *Croke* goes no further than that the plaintiff must prove the *quantum* of damages; the trespass, or cause of action, need not be proved. The charge of the

ALBANY,
Feb. 1806.

TILLOTSON
V.
CHEETHAM.

[* 59]

[* 60]

ALBANY,
Feb. 1808.
TILLOTSON
v.
CHATHAM.

judge was, therefore, correct, that the default admitted the publication of the libel, and the truth of the *innuendoes*.

2. The evidence of an assessment of damages in a former suit, for a similar libel, was properly rejected. Though relating to the same matter, and contained in a series of numbers, yet the numbers were published on different days, and each publication constituted a distinct libel, for which the plaintiff is entitled to a separate action.

3. There are many instances of private suits, where the mischievous tendency of the acts for which they are brought, in relation to the public, is allowed to be taken into consideration by the jury, in the assessment of damages. Such are the cases of *seduction*, *adultery*, and others of a similar nature.

KENT, Ch. J. Several reasons are assigned, why the assessment of damages, in this case, ought to be set aside.

1. It is alleged, that the jury were restrained from examining the remaining parts of the paragraph, or the parts of the publication which preceded and followed the libellous words selected. But this allegation does not appear to be supported. The affidavit, which is the ground of the motion, states, that the counsel for the defendant did read to the jury "the remaining part of the paragraph containing the libellous words," and that they drew their inferences "from the whole paragraph taken together." The jury had, then, before them, not only the libel, but the context, and were left to form their judgment of the damages "from the whole tenor of the publication." It is further stated, that the jury were charged, that the interlocutory judgment admitted the fact of the publication, *and the truth of the *innuendoes*. Of the accuracy of this position, I cannot entertain a doubt. It is a well-settled rule, that the interlocutory judgment admits the cause of action; (1 *Tidd's Practice*, K. B. 523. 3 *Term*, 302.) and in a suit for a libel, those two facts are essential to establish the right of action. But it is added, that the jury were told, that the defendant was estopped from calling their attention to the other paragraphs, *to show a different meaning of the libellous words from that set up by the plaintiff*. Most undoubtedly, the other paragraphs could not be considered with this view, and for this purpose, for it would be setting up a complete justification. If the defendant was to be permitted to show a different meaning to the words from that averred in the declaration, he would effectually destroy the right of recovery. The *innuendoes* are essential averments, and the interlocutory judgment confesses every material averment. When the affidavit was first read, it struck me that this part of it conveyed the idea, that the jury were directed not to pay any attention to the remaining paragraphs, *even with a view to regulate the damages*, and it led me to think, that the counsel who drew the affidavit had misapprehended the charge. But on examination of the affidavit,

I am satisfied, that it does not bear that meaning; and that, taken together, it substantially comports with my recollection of the opinion delivered to the jury.

2. The defendant offered in evidence, in mitigation of damages, a record containing an assessment of damages in favor of the plaintiff against the defendant, for publishing a libel on the 3d day of *July*, 1805; and he offered to prove, that the libellous words, in both declarations, were contained in a series of numbers published by him, which related to the manner and the means employed in procuring the incorporation of the *Merchants' Bank*. This testimony was rejected, and on a reconsideration of the point, I cannot but be of opinion, that it was properly rejected. As the causes of action were wholly distinct, (the one publication being on the 3d, and the other on the 17th *of *July*,) the admission of the record would have been without precedent, in the law of evidence. Although both libels were contained in a series of publications relative to one subject, yet they were separate publications, circulated at different times, and many of them, probably, among different hands, and the jury who passed upon the first libel could not have had the second before them. I cannot perceive on what principle the assessment in the one case, should regulate that in the other, whether the damages given be considered as a compensation to the plaintiff, or as a punishment on the defendant. On the ground of recompense for actual injury, the first recovery ought clearly to have no influence upon the second. The plaintiff is entitled to his strict compensation for every injury. A satisfaction for one *tort* is no satisfaction for another. This will not be denied. But the argument for the admission of the record of the prior recovery proceeds upon the supposition, that a part of the damages are to be considered as monetary, and given for the sake of example; but in this view of the question, the position taken by the defendant's counsel appears to me to be equally untenable. A subsequent jury have no means of analyzing the damages contained in a former verdict, and of ascertaining the respective proportions given for recompense, and for punishment. They cannot investigate the merits of the former cause. They have not the testimony before them. The doctrine is not to be confined to suits for defamation. It would apply to every case of *tort*; for juries, in all such cases, have a like discretion, on the subject of damages. The rule, to be just, must be mutual, and the plaintiff would have an equal right to show the former recovery, in order to enhance the damages, by exhibiting the malignant and irreclaimable disposition of a defendant. But no such practice has ever been admitted, because each case ought to be governed by its peculiar circumstances; and it would be exciting prejudices against the party, foreign from the *true merits of the cause. The principle would, as I apprehend, be mischievous in its operation. It would invite a repetition of injury, by the hopes

ALBANY.
Feb. 1808.

TILLOTSON
V.
CHEETHAM.

[* 62]

[* 63]

ALBANY,
Feb. 1808.

TILLOTSON
V.
CHEETHAM.

of comparative impunity, for the second offence; yet the repetition of an offence is evidence of deeper depravity, and calls for more exemplary punishment. Miserable would be the condition of civil society, if those who had once broken the law, by attacking the peace, or wounding the character of their neighbors could thereby acquire a valid plea for a future relaxation of its wholesome severities. We cannot, at present, foresee the extent of this doctrine. It would seem to require the admission of the record of a former recovery, in favor of a different plaintiff, for a portion of the damages in that case may equally have been given for the sake of correction and example. Suppose the rule to be once established, how could it be known that the verdict in the former cause had not been reduced down to damages for actual injury, by the evidence of a still prior recovery? Would the plaintiff be permitted to show that such evidence had been given on the former trial? Is one recovery to be a standing shield to a defendant, against all subsequent suits, where positive damages cannot be computed, or how long will it be before the efficacy of the first recovery will become exhausted, so as to leave the jury to their usual discretion? It is far more easy for me to anticipate, than it would be to surmount, the embarrassments which might arise from the application of the doctrine.

I can readily admit, that there may be cases in which the two offences follow so near to each other, in point of time, that exemplary damages in the first case might answer all the beneficial ends intended by this species of animadversion. But the possibility of undue or unnecessary damages in a subsequent suit, will not affect an established rule. The rules of evidence are stable and uniform principles, which cannot bend to the hardships of a particular *case, or yield to the discretion of courts. The record of a recovery for a like *tort* must, as a general rule, be admitted in mitigation of damages, or it must, as a general rule, be rejected. To admit it in particular cases only, and that, too, with limitations, would destroy the simplicity and certainty of the rule, and render the law of evidence vague and uncertain.

3. A third ground of the motion is, that the public character of the plaintiff, as an officer of government, and the evil example of libels, were stated by the judge to the jury as considerations with them, for increasing the damages. And, surely, this is the true and salutary doctrine. The actual pecuniary damages, in actions for defamation, as well as in other actions for *torts*, can rarely be computed, and are never the sole rule of assessment. "In cases of criminal conversation, battery, imprisonment, slander, &c., (to use the words of Lord *Camden*, in 2 *Wils.* 206.) the state, degree, quality, trade or profession of the party injured, as well as of the party who did the injury, must be, and generally are, considered by the jury, in giving damages." And, in the case to which these observations were

applied, he admitted, that the mere personal injury to the plaintiff was very small, but said that the jury had done right in giving exemplary damages, as it was a case which concerned the liberty of the subject. In another case, which came before the Court of *C. B.*, for debauching the plaintiff's daughter, (3 *Wils.* 18.) Chief Justice *Wilmot* observed, that actions of that sort were brought for example's sake, and that, although the loss to the plaintiff might not really amount to the value of twenty shillings, yet that the jury had done right in giving liberal damages. Again, in the case of *Pritchard v. Papillon*, (*Harg. State Trials*, vol. 3. 1071.) which was an action for maliciously causing the plaintiff, as lord mayor of *London*, to be imprisoned for a few hours, the chief justice charged the jury, that though it was no easy matter to *ascertain particular damages in such a case, yet that the malicious design of the party was to govern them, and that the government of the city and the honor of the magistracy were concerned, and put a weight upon their inquiry into the damages. But it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of the *English* and of the *American* courts of justice. It is too well settled in practice, and is too valuable in principle, to be called in question. As these were the only grounds of the motion which seem to have been relied on, or were material to examine, I am of opinion, that the motion must be denied.

ALBANY,
Feb. 1808.
TILLOTSON
V.
CHEETHAM

[* 65]

THOMPSON, J., and VAN NESS, J., declared themselves to be of the same opinion.

SPENCER, J. A judgment by default is an admission of the plaintiff's right of action, and where the damages are liquidated by the convention of the parties, witnessed by written documents, set forth in the plaintiff's declaration, the jury are bound to give the damages ascertained by the parties; there is no necessity of proving the note or writing thus set forth, though they must be adduced to the jury, that they may see whether endorsements have been made. In actions of a vindictive nature, such as the present, a judgment by default deprives the defendant of no other right than that of gainsaying the plaintiff's title to nominal damages, and of consequence, the printing and publishing the libel is admitted. With respect to real damages, the defendant has the same right to adduce evidence in mitigation of those damages, as he would have had, upon a plea of not guilty, after the publication of the libel, and the *innuendoes* had been proved. These are elementary principles, sanctioned as well by daily practice, as by adjudged cases.

It then becomes a question, whether the evidence of a record of a recovery by the plaintiff against the defendant, was properly excluded. It was offered to be shown, in *mitigation of damages,

ALBANY,
Feb. 1808.
TILLOTSON
v.
CHEETHAM.

that the plaintiff had recovered against the defendant, 1,400 dollars, for publishing in the same newspaper, containing the libel which is the foundation of the present suit, another libel, the *innuendoes* stated in both of which allege, that the plaintiff and others had been guilty of bribery and corruption, in obtaining the incorporation of the *Merchants' Bank*. It was also offered to be proved, that the libellous words contained in both declarations, were contained in a series of numbers, published by the defendant, all of them relating to the manner and means employed in procuring the incorporation of the *Merchants' Bank*; that the paper containing the libel, for publishing which the said 1,400 dollars had been recovered, was published on the 3d July, 1805, and the paper containing the libel for which this suit is brought, was published on the 17th of the same month. It no where appears, that a suit had been instituted for the publication of the first libel, before the second was published.

The defendant could not have pleaded the recovery in the first suit in bar to the second, because they were, technically, distinct offences, and the recovery in the former suit could be noticed in no other manner, than as mitigating the damages in the second suit. It cannot be inferred, from the affidavit before us, that special damages have been alleged in the declaration in either suit. Hence it results, that the plaintiff, having already recovered 1,400 dollars, for a libel of the same nature and tendency as the one which is the basis of this suit, without the allegation of any special damage in either case, would, on the second trial, recover as though the second publication was, in reality, a new, distinct and uncompensated offence. In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant. In the present case, the chief justice, in charging the jury, inculcated the doctrine of *giving exemplary damages, as a protection to public officers. It cannot, then, be denied, that by excluding the record of the former recovery, the defendant has again been assessed to the amount of 800 dollars, as though the present plaintiff had not recovered already for precisely the same kind of injury, and as though the defendant had not been exemplarily punished, for charging the plaintiff with conniving at the bribery of the legislature. It is said, that to admit this evidence would be innovating on the rules of evidence, and introductory of a new rule. No authority has been mentioned in support of this position, nor do I know of any rules of evidence, which would exclude the testimony offered. New cases require the establishment of new rules, by the application of old principles; those principles warrant the giving facts and circumstances in evidence, which go to regulate the verdict, so as to arrive at a just result. It is, in my conception, evidently

[* 67]

injust, that a fact should be suppressed and withheld from the jury, which would and ought to lessen the damages; for what honest man would give to a plaintiff, who had already recovered a large sum upon the same charge, as much in a second suit, when his character had been rescued from the imputations thrown on it, and when the defendant had been punished for example's sake. I grant, that had it appeared, that this libel was published after the defendant had been prosecuted for the publication of the 3d *July*, 1805, he would have deserved another punishment for example's sake; but this did not appear. It is easy to suppose cases, where the injustice of refusing such kind of evidence as that now offered, would be universally felt and acknowledged; as, for instance, the sale of libellous publications by a bookseller. Every sale being a new publication, would it not meet the reprobation of mankind, to hold him alike obnoxious to damages, for each publication, or to hold that the plaintiff had the same title to damages in the hundredth suit, as in the first? In every *light in which I can view the subject, I am struck with the abstract justice of admitting the evidence offered, and I am unconscious that any part of the law of evidence is violated thereby. For refusing this evidence, in my opinion, the inquisition should be set aside, and a writ of inquiry *de novo* issue. I cannot yield my assent to the position of the chief justice, on the inquiry, that the defendant's counsel were estopped from calling the attention of the jury to any other part of the context, to show a different meaning of the libellous words, from that alleged by the plaintiff, having already said, that though the plaintiff was, in consequence of the default, entitled to nominal damages, yet, as respects real damages, the defendant was at liberty to urge to the jury, that the *innuendoes* were not warranted by the context, and that, from the libel collectively, he did not intend to attribute to the plaintiff any agency in bribing the legislature. I dissent from the principle laid down by the chief justice, without giving an opinion, whether the *innuendoes* were or were not warranted by the context.

ALBANY.
Feb. 1808.
TILLOTSON
V.
CHREETHAM

[* 68]

Rule refused.

ALBANY,
Feb. 1908.

PIERSONS

v.

HOOKEK.

PIERSON and PIERSON *against* HOOKER.

If one of several partners execute a deed of release under his hand and seal, in the name of the copartnership, of a debt due to the copartnership, it is [* 69]

binding on all the partners. Such a release being for all demands, parol evidence is inadmissible to show that a particular debt was not intended to be released. Where an endorser of a note, which has not been paid by the maker, afterwards promises the holder to pay the note, a previous demand on the drawer, and notice to the endorser, need not be proved, but will be presumed. (a)

(a) *Bridge v. Johnson*, 5 Wend. Rep. 352. *Austin v. Hale*, 13 Johns. 286. *Fitch v. Forman*, *Bulkeley v. Dayton*, 14 Johns. 172. 187.

THIS was an action on an inland bill of exchange, drawn by the defendant on *Adams, Merrit & Co.*, in favor of the plaintiffs, payable 60 days after date, for two hundred and seven dollars and seventy-six cents, dated the 10th day of *July*, 1804. The bill was accepted by the drawees.

At the trial, the signature of the defendant, and of the acceptors, was admitted, and that due notice of non-payment had been given to the defendant. It was proved that the defendant promised payment of the bill after *it became due, and the judge ruled, that a promise to pay by the drawer, was a waiver of the necessity of proving a demand on the drawee, or notice to the drawer.

The defendant then produced a sealed instrument, dated 17th *June*, 1805, and executed by one of the plaintiffs, in the name of the firm, by which he acknowledged a receipt of ten shillings in the pound, and in consideration of one shilling paid, released the defendant of and from all debts and demands, of every nature and kind whatsoever. The judge decided, that this release extinguished the debt. The plaintiff then offered evidence, that at the time of the execution of the release, it was not intended that it should affect the present demand, and that the defendant had since promised to pay the bill. This testimony was objected to and overruled, and the plaintiffs were nonsuited.

A motion was now made to set aside the nonsuit.

Foot, for the plaintiff. Considering this release as a deed, it is the deed only of the partner who signed the copartnership name. It amounts, then, to no more than a release by that partner. Now, a release signed by one individual partner will not release a copartnership debt, unless it be expressly mentioned as a debt due to the copartnership. If it is not stated to be a copartnership debt, the release operates as a discharge only of the private debts due to the individual. But the instrument, in the present case, can have no other effect than a writing without seal; and as it was uncertain whether private or copartnership debts were intended, there was an ambiguity which the plaintiff ought to have been allowed to explain by parol evidence.

Sedgwick, contra. The principle that one partner cannot execute a deed for his copartner, does not apply to the present case. The partner who signs the copartnership name, and affixes his seal, is bound by it, as his own act; and it is a settled rule that a release by one of two joint creditors, is a bar to any action for the joint debt. The release is a deed, and is not to

be explained by parol. Nor *is there any ambiguity as to what debts were intended, for it is a release of all demands. Another point in the cause is, whether a subsequent promise by the drawer is a waiver of the notice of non-payment. [*The court said that he need not argue that point.*]

ALBANY,
Feb. 1808.

PIERSONS
V.
HOOKER

KENT, Ch. J., delivered the opinion of the court. The release was executed by one of the plaintiffs *in the partnership name*. It is therefore impossible to doubt, but that it was intended to affect and cancel partnership demands. The plaintiffs, however, offered parol testimony to show that the *present* demand was not one of those which were intended to be included. But the instrument is general and comprehensive, and expressly reaches to every debt and demand of every kind. To show by parol proof that it was not so intended, is to contradict or explain away the instrument, which is contrary to the established rule of law. It is again said that one partner cannot bind another by deed. This, as a general position, is correct; but it does not apply to the case before us. Here was no attempt to charge the partnership with a debt by means of a specialty, but it is the ordinary release of a partnership debtor. It is a general principle of law, that where two have a joint personal interest, the release of one bars the other; (*Ruddock's case*, 6 Co. 25.) and I cannot perceive, that the case of copartners in trade forms an exception to the general rule. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands. He is to be considered as an authorized agent of the firm, for all such purposes. (*Watson*, 137. 141.) Each has an entire control over the personal estate. So, in like manner, one co-executor or administrator, cannot bind his companion to an obligation, but he may commit a separate *devastavit*, and release a debt. This court admitted the general principle, in the case of *Clement v. Brush*, (*July term*, 1802,) in which it was held, that if one partner gave his separate bond for a copartnership, simple contract debt, the simple contract was *extinguished* by the specialty.

*As the matter set up by way of defence was admissible and sufficient, it becomes unnecessary to examine an objection raised to the testimony in support of the plaintiff's right of action, that the plaintiffs did not prove a previous demand on the drawees of the bill. If this was now to be decided, it would perhaps be sufficient to refer to the case of *Lundie v. Robertson*, (7 *East*, 231.) in which the very point arose, and the Court of *K. B.* held, that where the endorser had made a subsequent promise to pay, a previous demand on the drawer, and due notice to the endorser were to be presumed, and need not be proved. This decision was agreeable to the ancient opinions of Lord *Raymond*, and Ch. J. *Lee*, at *nisi prius*. (See *MS. report of Burnet*, in a note to the above case, and *Str.* 1246.) On this last point, however, we give no definitive

[* 71]

ALBANY,
Feb. 1808.
M'MENOMY &
TOWNSEND
v.
FERRERS.

opinion: but on the ground of the competency and conclusiveness of the defence, the motion for a new trial is denied.

Rule refused.

M'MENOMY and TOWNSEND, Assignees of MARK and SPEYER, Bankrupts, against FERRERS.

M. & S., being in embarrassed circumstances, on the 15th [* 72] April, 1800, executed a conveyance of certain lands, which, by a declaration in writing, executed by them, on the 31st May, 1800, they declared to be in trust, to pay particular creditors, in preference. On the 3th June, 1800, they drew an order on one F., their agent, directing him to pay to R., such moneys as should come to his hands, from certain persons in Europe, from whom F. had been authorized to receive the amount of certain policies of insurance, which order was accepted by F., on the same day, to pay the moneys as soon as they came into his hands. On the 11th July, 1800, M. and S. committed an act of bankruptcy, and on the 18th July, 1800, were

THIS was an action of *assumpsit*, for money had and received to the use of the plaintiffs. Plea, *non assumpsit*. The cause was tried, the 4th April, 1806, before Mr. Justice *Tompkins, at the circuit in King's county. J. Mark and J. Speyer, having been partners together, under the firm of Jacob Mark, & Co., dissolved their copartnership, in the month of August, 1799. On the 18th July, 1800, Mark & Speyer were duly declared bankrupts, having committed an act of bankruptcy on the 11th July, 1800. The plaintiffs were appointed assignees, and an assignment was made to them by the bankrupts, in September following. Previous to the bankruptcy of Mark & Speyer, they appointed the defendant their agent, in relation to a certain claim which they had against persons in Europe, arising out of certain policies of insurance, and the defendant, as agent of Mark & Speyer, subsequent to their bankruptcy, received from Europe, on account of such claim, the sum of 733 dollars. M. & S. being indebted to one J. Roosevelt, in a sum of money, exceeding the amount in controversy in this cause, on the 13th June, 1800, drew an order on the defendant, in favor of Roosevelt, and which was, on the same day, accepted by the defendant. The order was as follows:

"Sir—You will please to pay to James Roosevelt, or to his order, such moneys as shall come to your hands, due to Jacob Mark & Co., on account of policies of insurance, signed by the said Jacob Mark & Co., whereof a recovery shall be had on those policies; and the said James Roosevelt is hereby authorized and empowered to give discharges for the same, and convert the amount to his use, for value received. New-York, 13th June, 1800." Signed "Jacob Mark, for Jacob Mark & Co., addressed to Mr. John Ferrers." The acceptance by the defendant was in the following words: "New-York, 13th June, 1800, Accepted, to account as above, for such moneys as may come to my hands, in consequence of my agency for Messrs.

duly declared bankrupts, under the law of the United States, which took effect on the 1st June, 1800. In an action brought by the assignees of M. and S., against F., it was held, that the order and acceptance amounted to an assignment, and fixed the fund irrevocably, and that the order was not given in contemplation of bankruptcy; so as to make it fraudulent under the bankrupt law. (a)

(a) See *Weston v. Barker*, *Carsfield v. Monger*, 12 Johns. 276. 346.

Jacob Mark & Co. in the cases above stated." Signed "*John Ferrers.*"

ALBANY.
Feb. 1808.

M'MENOMY &
TOWNSEND
V.
FERRERS.
[* 73]

It appeared, that in the autumn of the year 1799, the affairs of *M. & S.* were considerably embarrassed. On the 2d *December*, 1799, they executed a deed to *John Murray*, of the city of *New-York*, for 64,000 acres of *land, lying in the county of *Clinton*, in trust, for certain of their *German* creditors, and upon certain terms specified in the deed. One of the terms was, that if the said creditors did not consent to release *Speyer*, or give notice of their acceptance of the land, at 2 dollars per acre, by the 1st day of *January*, 1801, then the property was to be applied to other purposes. In the month of *April*, 1800, *Speyer* conveyed to *Murray*, two lots of ground in the city of *New-York*, some canal, and other shares, in trust, for securing a debt due from *Speyer* to his father; and for the same purpose he executed, on the 31st *May*, 1800, a bill of sale of all his furniture to *Murray*, but which was afterwards returned to *Speyer*. On the 31st *May*, 1800, *Mark* executed a deed, or declaration of trust, to *Townsend*, one of the plaintiffs, and *S. Jones, jun.*, reciting a conveyance, then lately made, (15th *April*, 1800,) by *Mark* to *Townsend* and *Jones*, of upwards of 60,000 acres of land, besides other property, in trust, to pay all debts due by *Mark & Speyer* to the said *Roosevelt*, in the manner, and for the reasons, set forth in the declaration; which stated, by way of recital, that the said *Roosevelt*, at the request of *Mark*, and to befriend *Mark & Speyer* and under a full belief of their solvency, had, at sundry times, lent them large sums of money, and had endorsed their notes, to the amount of 25,000 dollars, and upwards, the payment of which loans, and an indemnity against which said engagements, they, *Mark & Speyer*, had considered it their duty to secure to the said *Roosevelt*, as far as in their power, in preference to all other debts and demands against them; and that *M. & S.* had given to *Townsend* and *Jones* a judgment for 100,000 dollars, in trust, for *Roosevelt*, on which no execution was to be taken out against the body of *Mark*. The declaration further stated, that the conveyance was in trust to pay the debt to *Roosevelt*, before any other creditor; and that, in case the creditors of *M. & S.* would take an assignment of the property, for the payment of their *debts, valuing the land at the rate therein specified, then the trustees might assign the same, on condition that all the demands of *Roosevelt* were first paid, or sufficient property retained, to be selected by them, to pay *Roosevelt*. The declaration further stated, that if it should happen at any time, while the premises remained in trust, that a commission of bankruptcy should be sued out against *Mark & Speyer*, or an assignment should be made, under the insolvent act of the state of *New-York*, and it should become necessary, in the opinion of the trustees, that then it should be lawful for them to vest the property in the hands of the assignees under the

* 71

ALBANY,
Feb. 1808.
M'MENOMY &
TOWNSEND
V.
FERRERS.

bankrupt law, or the insolvent act, retaining enough, in their opinion, to satisfy *Roosevelt*, to be selected by them; the property so retained, not to be assigned until *Roosevelt* was fully satisfied, or consented, or unless compelled by law, or unless counsel should advise that they might be compelled by law to assign, and not then, unless *Roosevelt* neglected for three days to indemnify the trustees.

All the land, described in the last-mentioned deed, except 22,000 acres, had been mortgaged, and a considerable part sold under the mortgage. No encumbrance appeared on the 22,000 acres. *Mark*, on his examination before the commissioners, stated the value of the land to be from 2 to 3 dollars per acre; but on a sale of part of them, under a decree of the Court of Chancery, it sold only for 77 cents per acre. *Speyer*, on his examination, stated, that *Mark* and his wife, in *March*, 1800, executed a mortgage for 6,000 dollars, for which sum a judgment was also entered up to secure *Murray*, for the advances which he might make to *Mark & Speyer*, in case they should be obliged to go to prison, which they then contemplated, and to be relieved under the insolvent act of this state. It appeared further, that at the time *Speyer* assigned his household furniture to *Murray*, he also assigned a bond against one *Hommel*.

[* 75]

At the trial, *Mark* (who had obtained his certificate) testified, that he could not say what was the precise balance due to *Roosevelt*, but he believed it to be *upwards of 20,000 dollars, and that he had agreed to pay *Speyer* 10,000 dollars for his interest in the partnership, at the time of its dissolution, and to take the whole benefit and burthen upon himself; that the order given to *Roosevelt*, on the defendant, was not given in contemplation of bankruptcy, and that he had no expectation of becoming a bankrupt, a fortnight before the commission issued.

Samuel Jones, jun., who was sworn as a witness on the trial, testified, that the above-mentioned deed to *Murray* was executed, as he understood, in compliance with the engagements of *Mark & Speyer*, to give the creditors named therein, or the majority of them, land, as security for their debts; that most of the creditors had made loans to *Mark & Speyer*, on the credit of the lands specified in the deed, or other lands of *Mark & Speyer*, under certain agreements between them; that *Roosevelt* applied to the witness, to endeavor to obtain security from *Mark & Speyer*, for whom the witness was counsel, some time before the execution of the deed above-mentioned, to him and *Townsend*: the witness could not state with certainty how long before, but thought it as early as *March*, when he spoke to *Mark & Speyer* on the subject; that *Roosevelt* alleged, as the ground of this application, that he had been promised security at the time he lent his endorsements, and which *Mark* admitted; that *Roosevelt* was pressing for security, which *Mark*

declined, saying it was unnecessary, and that he did not wish to encumber his lands, nor to put it in the power of *Roosevelt* to sacrifice them by forced sales; but was finally prevailed upon, though with some difficulty, to execute the deed above-mentioned, on condition that *Townsend* and the witness should be the trustees; that *Roosevelt* still complained that the security was not such as had been promised to him, and that he ought to have further security. The witness further stated, that he was acquainted with the affairs of *Mark & Speyer*, and did *not believe that they could get on, and such had been his conviction for a long time; he had thought that they must either become bankrupts, or seek relief under the insolvent act, but he did not know what course of conduct they meant to pursue; that *Mark* appeared to think that he should be able ultimately to pay his debts, and seemed, at first, very sanguine in that opinion, and persevered in the belief, until very shortly before *Mark & Speyer* became bankrupts. The witness believed, though he did not certainly know, that *Mark & Speyer* had discontinued their regular course of business, from the time of the dissolution of their copartnership. That the deed and judgment, given as security to *Roosevelt*, on the 15th April, 1800, and the declaration above-mentioned, were all intended as one transaction, and were so agreed on, and directed to be made out by the parties, previous to the execution of the first deed, which did not express the trust, and that the delay in executing the declaration of trust was owing to accident or a pressure of business, and not to any design.

The judge charged the jury, that actual insolvency, or a state of things which would induce a belief in others of the insolvency of a debtor, or a belief or expectation by a creditor of such insolvency, or contemplation of bankruptcy by his debtor, and of the intent of the creditor to acquire a preference by the security he obtains, did not furnish the criterion by which the present suit was to be determined; but the question for the jury to determine was, whether the debtor, at the time he gave the order in question, contemplated bankruptcy, and intended to prefer a particular creditor. If so, the transaction would be void, as against the spirit of the bankrupt law; but that if the debtor was coerced into the measure, by an apprehension of an arrest, on refusal, or could not avoid giving the security, or if it was done in performance of an agreement made when no preference was contemplated, then, in either of those cases, the creditor was entitled to his security, though the debtor contemplated bankruptcy, *when the security was given. He, however, informed the jury, that, in his opinion, if they believed *Mark* contemplated bankruptcy, at the time the order was given, there was not evidence in the cause to induce a belief that the order was obtained by threats of legal coercion, or in performance of any antecedent agreement; and that the order was valid, notwithstanding the intervening act of bank-

ALBANY,
Feb. 1808.
M'MENOMY &
TOWNSEND.
V.
FERRERS.

[* 76]

[* 77]

ALBANY,
Feb. 1886.
M. METCALY &
TOWNSEND.
v.
FARRERS.

ruptcy; if Mark did not contemplate bankruptcy when he gave it.

The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge, and because the verdict was against evidence.

Pendleton, for the plaintiff. 1. The order created no specific lien on the fund. Its terms show it to be revocable. The defendant was a mere commercial agent, acting for his principal, and his agency was of a revocable nature. The order was pable to a contingency, and the agent had no authority to pay, until the money came into his hands. Such an authority would be at an end, by the intervening bankruptcy of the agent, or of the makers of the order, or by the death of the parties. An act of bankruptcy is a revocation of all authorities given by the bankrupt; (*Smith v. Goddard*, 3 Bos. & Pull. 465.) and the 13th section of the bankrupt law of the United States (*Laws of the U. S. v. 5. p. 55.*) declares the same principle. As the money, therefore, came into the hands of the defendant, after the bankruptcy of Mark & Speyer, he must be considered as receiving it to the use of their assignees. If, after making this order, Mark & Speyer had made a regular assignment to a third person in Europe, of this fund, would not such an assignment have been valid? *A fortiori*, must an assignment under the bankrupt law prevail. (*Horil v. Browning*, 1 East, 154.) No doubt, that if an order be drawn on the person holding the fund, it will attach and be a lien; such are the cases of *Peyton v. Hallett*, (1 Caines, 363.) and *Yates v. Groves*, (1 Ves. jun. 280.) which will, probably, be cited on the other side. In the present case, the order is not on the person holding the fund, but on an agent, directing him to pay, when he should receive the money.

*78]

*It has been held that, if a person endorses a note to another, which is sent by post, and the next day, before the endorsee receives the note, he becomes a bankrupt, the endorsement is void. (*Alderson v. Temple*, 4 Burr. 2235. *Harman v. Fisher*, Cowp. 117.) Again, no notice of the order was given to the debtors, or persons holding the fund in Europe. Might not Mark & Speyer have received the money themselves, without being liable to an action by Roosevelt? If so, their assignees may receive it.

2. The order was intended as a voluntary preference to a particular creditor, and in contemplation of bankruptcy, and was, therefore, fraudulent. There appears to have been no pressure, or legal diligence used against Mark & Speyer by Roosevelt. An indefinite promise of security could not be enforced, and created no legal obligation. If made in contemplation of bankruptcy, such promise would be void. Indeed, the facts in the case most irresistibly lead to the conclusion

that *Mark & Speyer* contemplated a bankruptcy, and that they were determined to give a preference to *Roosevelt*. The original deed of the 15th *April*, 1800, contained no declaration of trust, and must, therefore, be considered as in trust for the grantor, and void as against creditors. The subsequent declaration of trust of the 31st *May*, will not so attach on the original deed, as to make it valid, as one *bona fide* conveyance. But the deed of declaration itself, expressly states the inability of *Mark & Speyer* to pay their debts, and contains provisions in favor of a particular creditor, in case of bankruptcy. Is it possible, then, to believe, that they did not contemplate bankruptcy when they made that conveyance? The subsequent explanations by *Mark*, cannot destroy the strong internal evidence, arising from the written documents. Though the deed of the 31st *May*, 1800, was not of itself an act of bankruptcy, since the law of the *United States* did not take effect until the 1st *June*; yet the act had been passed, and the deed was made with a view to defeat the operation of it, and must, therefore, be considered as made *in fraudem legis*, and void. (1 *Johnson*, 374. 3 *Wilson*, 47.) This conveyance comprised all the property of *Mark & Speyer*, *except what had been given as security to particular creditors. A deed in trust to pay all creditors, except one, is void; (*Gayner's case*, 1 *Burr*. 477. *Cook's B. L.* 3d ed. 108.) but here was a deed in trust to pay one creditor, in exclusion of all the rest.

ALBANY.
Feb. 1808.

M'MENOMY &
TOWNSEND
V.
FERRERS.

[* 79]

P. W. Radcliff and *Benson*, contra. 1. This order was not a mere authority to receive money, but a transfer of so much of the fund. The cases of *Row v. Dawson*, (1 *Vesey*, 381.) and *Yates v. Groves*, (1 *Vesey*, jun. 280.) are strong cases to show, that such an order amounts to an assignment. No particular form of words was necessary; as soon as the order was accepted, the property was fixed. But this point has been expressly decided, in an analogous case, that of *Peyton v. Hallett*, (1 *Caines*, 363. *Livingston*, J., 379.) in this court. The order could no more be revoked after it was delivered, than the assignor of a bond could revoke his assignment. If the persons in *Europe*, who had the fund, should have paid it before notice of the order, they could not, it is true, be again called upon for the money. But whether such notice was, in fact, given or not, will not vary the question before the court. *Mark & Speyer* transferred their right, and *Roosevelt* took upon himself the risk of notice. Again, after the order was shown to the defendant, he must be considered as the agent or trustee of *Roosevelt*, in relation to the money, and as no longer the agent of *Mark* or *Speyer*, or their assignees.

2. To make void an assignment or delivery of property by a debtor, it must be shown to have been done in contemplation of a certain and impending bankruptcy, not from the vague apprehension of a possible future bankruptcy. A conveyance

ALBANY,
Feb. 1803.
M'MENOMY &
TOWNSEND
V.
VARRERS.

[* 80]

by a trader of part of his property, carries with it no evidence of fraud; and if complete, before the act of bankruptcy, it will be valid, unless there be positive evidence of fraud. (*Cullen*, 44. 50.) To the general rules on this subject, there are several exceptions: As if the conveyance or delivery be made to relieve the party from legal process, or from the bare threat or even groundless apprehension of it, the conveyance is valid. (*Alderson v. Temple*, 4 Burr. 2239. *Thompson v. Freeman*, 1 Term, 155.) And it is not even necessary, that a man should be actually arrested. It is enough, if the creditor comes with a pressing demand on the feelings and conscience of the debtor, and urges him for security. (*Ex parte Scudamore*, 3 Vesey, jun. 85. *Cullen's B. L.* 280, 281.) So if payment be made, or an act be done, in pursuance of a prior agreement, or in the ordinary course of business, it will be valid. (*Harman v. Fisher*, Cowp. 125.) In the case of *Smith v. Payne*, (6 Term, 153.) Lord Kenyon recognized all these exceptions, and under the circumstances of the case, which were not very dissimilar to the present, and because the bankrupt himself had sworn to the honesty of the transaction, and that he did not meditate a bankruptcy at the time, he refused to set aside the verdict. In the present case, there was a prior engagement to give *Roosevelt* security; and *Mark* has sworn expressly, that it was not done in contemplation of bankruptcy. *Roosevelt* was certainly a very meritorious creditor, and had peculiar claims on *Mark & Speyer*, for security; and, as was observed by the master of the *Rolls*, in the case of *Small v. Oudley*, (2 P. Wms. 429.) there may be cases so circumstanced, that a trader honestly may, nay, ought to give a preference.

[* 81]

There is nothing in the deed and declaration of trust, if attentively examined, that indicates fraud, unless the giving a preference to *Roosevelt* be a fraud. The provision, in case of bankruptcy, was solely for the purpose of giving the trustees a direction, in relation to the execution of their trust, in case such an event should happen. It was the contemplation of a possible bankruptcy. But in answer to these allegations of fraud, in relation to the bankrupt law, it is sufficient to say, that all the transactions complained of, were prior to the existence of that law; for though the act of the *United States*, on this subject, passed the 4th April, it was to have no operation until the 1st June, 1800. It may be said, then, to have had no legal existence or power, until the 1st June, so that no fraud in relation to it, could arise from acts done prior to that time. Again, there has been a verdict in this cause for the defendant, in the *common pleas*; and after the removal of the cause here, there has been another verdict in his favor, and whether fraud or not, being a question of fact, it is unprecedented to grant a new trial after a second verdict.

Pendleton objected, that no notice could be taken of what

passed in the Mayor's Court, in relation to this cause ; and *Radcliff* offered an affidavit of the facts, as he had stated them.

ALBANY.
Feb. 1808.

M'MENOMY
TOWNSEND
v.
FERRERS.

SPENCER, J. The judges of this court must know, and will take notice of what passes on trials before them ; but we have no such knowledge in relation to trials before inferior courts, and to bring the facts before this court, by affidavit, is unprecedented.

KENT, Ch. J. We may, perhaps, take notice of the fact, in the exercise of our discretion, as to granting a new trial.

THOMPSON, J. Though it is unusual to receive affidavits in such a case, yet I see no objection to taking notice of the fact suggested, when we come to exercise our discretion as to the propriety of granting a new trial.

T. A. Emmet, in reply. 1. The rule laid down by Chief Justice *Lewis*, in the case of *Peyton v. Hallett*, (1 *Caines*, 380.) seems to me to be the correct one ; that the *lien* is confined to the case of an order on the person holding the fund, and has never been extended so far as to vest an interest in one man, in a fund which may, or may not, come into the hands of another. The acceptance of the order in the present case is conditional ; that is, " If I receive the money, and receive it as the agent of *Mark & Speyer*, I will pay it to you." No doubt, if the money had come into the hands of the defendant, prior to the bankruptcy of *Mark & Speyer*, they would have been bound by their order to pay it to *Roosevelt* ; but here the fund might have been attached in *Europe*, or *Mark & Speyer* might have displaced the defendant as their agent, before the money was paid to him.

2. It does not appear, from the case, that *Roosevelt* knew of the order or the acceptance. It appears, then, to be *a transaction incomplete, or an arrangement made with a view to prefer *Roosevelt*. The law on this subject is well summed up by *Wood*, *arguendo*, in the case of *Rust v. Cooper* : (*Cowper*, 630.) " Though in general, a trader, before an act of bankruptcy committed, has such a property in, and power over, his effects, as to do acts which, by consequence, may give one creditor a preference to another ; yet, if he is *insolvent*, or has an act of bankruptcy in contemplation, he can do no act out of the usual course of trade, in favor of a particular creditor." The length of time intervening makes no difference, if a bankruptcy is contemplated. In the case of *The Assignees of Cummings v. Jackson*, (1 *Johnson*, 370.) the court considered the stopping payment and insolvency, as controlling circumstances, to show a meditated bankruptcy. It is not pretended, that here was any fraud, in a moral sense, but a legal, or constructive fraud. What circumstances amount to a fraud is a ques

[* 82]

ALBANY,
Feb. 1808.
M'MENOMY &
TOWNSEND
v.
FERRERS.

tion of law. (1 *Burrow*, 396.) There are strong and sufficient circumstances, in the present case, to justify the court in making the inference of fraud. The acknowledged *insolvency* of the debtors, the *preference* of a particular creditor, and the transaction being out of the ordinary course of business, with the very suspicious character of the conveyance to *Townsend & Jones*, most conclusively show that species of fraud, which must render this act of *Mark & Speyer* void, and that the plaintiffs are, therefore, entitled to the money in the hands of the defendant.

VAN NESS, J., delivered the opinion of the court. A new trial is moved for in this cause;

1st. Because the order drawn by *Mark*, in behalf of himself and partner, upon the defendant, was contingent and revocable, and that it was, in fact, revoked by the intervening bankruptcy of the drawers:

2d. Because the order was given in contemplation of bankruptcy, and for the purpose of giving *Roosevelt* an undue preference, and so a fraud upon the bankrupt law.

[* 33]

*I consider the first question as settled by the decision of this court, in the case of *Peyton v. Hallett*. (1 *Caines*, 363.) The order, in that case, was drawn upon an agent, not in possession of the fund out of which it was to be satisfied; and the objection, arising from that circumstance, was much relied upon, and seems to have been well considered. The court held, that the order and acceptance fixed the fund irrevocably, and amounted to an equitable assignment of it. The effect *Peyton's* bankruptcy might have had on the order, was also noticed, and the court supposed that *White* (the witness) would not have been deprived, thereby, of his *lien*. Indeed, upon no other principle, could *White* have been considered as an incompetent witness. This decision is not only well founded in principle, but is supported by authority. (*Powel v. Gordon*, 2 *Esp. Rep.* 735. *Green v. Scott*, 1 *Ves. jun.* 282. *Row v. Dawson*, 1 *Ves.* 331.) I am satisfied that there is no ground for the distinction that was attempted to be shown between this case, and those which have been mentioned. It was strongly urged, on the argument, that, in the case of *Green v. Scott*, and *Row v. Dawson*, the funds were actually in the hands of the drawees. This is not so. In the last of these cases, the very terms of the order will show, that part of the bond was not in hand. Nothing, even at law, vests in the assignee of a bankrupt, but such real and personal estate, of which the bankrupt had the *equitable*, as well as *legal* interest. (*Willes's Rep.* 402.) In the case of *Carpenter and others v. Mainell*, (3 *Bos. & Pull.* 40.) it was held, that where a bankrupt, before his bankruptcy, had endorsed a note, payable out of a contingent and specified fund, although the endorsement had no legal effect, yet it passed the beneficial interest, and

the bankrupt became a mere trustee for the endorsee, and that the trust did not pass to his assignees, under the assignment.

The moment the money, in this case, came into the hands of the defendant, he became bound to pay it over to *Roosevelt*. Certainly, *Mark & Speyer* could not reclaim *it; and unless the order was fraudulent, their assignees succeeded to no greater or better rights. This appears to me to be a case, that must frequently have occurred in the course of commercial transactions, and great and extensive mischief and inconvenience would result from the doctrine, contended for by the counsel for the plaintiffs, if it should have been found necessary to accede to it.

The remaining question, if the bankrupt system was still in operation, might present some difficulty. The bankrupt law was passed on the 4th *April*, 1800; but was not to take effect until the 1st of *June*, 1800. *Mark & Speyer* were declared bankrupts, on the 18th of *July*, upon an act of bankruptcy committed on the 11th of *July*, in the same year. The deed to *Jones & Townsend* is dated the 15th of *April*, and the declaration of trust, the 31st of *May*, 1800, both anterior to the period when the bankrupt law went into operation. The order on the defendant is dated the 13th of *June*, nearly a month before the act of bankruptcy was committed.

It is not contended, that the conveyances, and other dispositions, which *Mark & Speyer* made of their property, prior to the 1st of *June*, of themselves, amounted to an act of bankruptcy. The bankrupt law never attached upon them, unless by construction, until after they were completed. But it is said they were fraudulent, because designed to defeat or evade the operation of an act which they knew would, in a short period, put it out of their power to give a preference to favored, or, what they conceived to be, meritorious creditors. Before the bankrupt law, debtors had a right to give a preference to *bona fide* creditors. There is nothing in our insolvent laws to prohibit it; and the bankrupt law left this right, until the 1st of *June*, 1800, unimpaired. In *England*, before the passing of the bankrupt laws, debtors had the same right; whenever, therefore, we find it said in the books, that an attempt to give a preference to a particular creditor, on the eve of bankruptcy, is fraudulent, it is to be understood, *that such attempt is fraudulent, as against the spirit of the bankrupt laws only. If the deeds to *Murray* and to *Jones & Townsend* were executed by *Mark & Speyer*, with a view of giving a preference to certain of their *bona fide* creditors, and of this I think there is no doubt, that was permitted by the law of this state, and until the 1st *June*, was not prohibited by the act of Congress, and, therefore, they were not fraudulent. The order in question, however, was given after the 1st *June*,

ALBANY,
Feb. 1808.

M'MENOMY &
TOWNSEND
v.
FERRERS.
[* 84]

[* 85]

ALBANY,
Feb. 1808.

M'MENOMY &
TOWNSEND
v
FERRERS.

and when, it is insisted, a bankruptcy must have been contemplated.

It is difficult to reconcile the fact of the bankrupts' having pledged all their property for the payment of their debts, with a belief, that at the time this order was given, a bankruptcy was not contemplated. Their situation appears to me to have been hopeless, and the whole course of their conduct, for many months before the date of the order, looks as if they were meditating on the best means to procure a discharge from their creditors, by surrendering to them all their property. Still, however, there is the positive testimony of *Mark*, who was a competent witness, and whom the jury must have believed, that the order was not given in contemplation of bankruptcy, and that he had no expectation of becoming a bankrupt, a fortnight before the commission issued. *S. Jones's* testimony strongly supports that of *Mark*. He says, that *Mark* appeared to think he should be able, ultimately, to pay his debts; and that he persevered in that belief until very shortly before he became a bankrupt. I think it probable that *Mark* was sincere in the belief. The property of the bankrupts consisted, chiefly, of very large tracts of new lands, the value of which they did not understand, and greatly overrated; and this is not the first time that this species of property has proved a most deceptive and precarious source of relief against the pressing calls of numerous and importunate creditors. Upon the whole, the question, whether a bankruptcy was contemplated or *not, when the order was given, has been twice fairly submitted to a jury, who have found for the defendant; and taking into consideration, that the bankrupt law is repealed, and that it probably never will be reenacted, because no attempt has hitherto been made for that purpose, and that the sum in controversy would afford, as it were, but a nominal dividend among the creditors, we are against the interfering with the verdict; and, consequently, the motion for a new trial must be denied.

Rule refused

[* 86]

ALBANY.
Feb. 1808.WHITNEY *against* CAMP and TOWNLEY, Tertenants of
CROSBY, deceased.WHITNEY
v.
The Tertenants
of CROSBY.

STEWART, for the defendants, moved to set aside the *scire facias* issued in this cause, and all the subsequent proceedings thereon. The following are the material facts, as stated in the affidavits, which were read. A judgment having been obtained in favor of the plaintiff, against Crosby, on a demurrer to the declaration, in August term, 1805, the same was signed the 16th August, 1805, and was revived the 15th February, 1807. On the 2d March, 1807, a *scire facias* was issued on the said judgment, against Camp & Townley, as tertenants of Crosby, deceased, directed to the sheriff of the county of Broome, who returned that he had, by two good men, noticed the tertenants of the land, whereof Crosby was seised, on the day of the judgment to appear, &c. On filing the *scire facias* and return thereon, a rule was entered, the 5th May, 1807, requiring the tertenants to appear. On the 9th May, 1807, their defaults were entered, and on the 15th May, the plaintiff entered a rule for final judgment. On the 13th July, 1807, the judgment-roll was signed and filed, and on the 29th July, a *fieri facias* was issued.

A *scire facias* issued, on a judgment obtained against C., against A. and B., as tertenants of C., deceased, which was returned by the sheriff, that he had given notice to the tenants of the land, of which C. was seised, &c. to appear, &c. On the 5th of May, 1807, a rule was entered for the tertenants to appear; on the 9th of May, 1807, their

[* 87]

defaults were entered, and on the 15th of May, 1807, the plaintiff entered final judgment. It was held, that the tertenants were too late, after a judgment by default, to move to set aside the *scire facias*, on the ground, that the heirs and personal representatives of C., had not been previously warned, or because they were not such tertenants, as ought to have been summoned, especially, when they disclosed no merits in behalf of themselves, or the representatives of C.; and that the proceedings on the *sci. fa.* were regular, and the tertenants duly warned.

Hoffman, contra. Though it is said, in the *English* books, that where judgment is had against one who dies before execution, that a *scire facias* will not lie against his heirs or tertenants, until a *nihil* has been returned on a *scire facias*, against the executors or administrators; (2 *Tidd*, 1059. 2d ed. *Carthew*, 107.) yet the practice in this court has been different, and seems countenanced by the language of the 7th section of the act for the amendment of the law, (*Laws of N. Y.* vol. 1. p. 350.) where it is said, that on assessment of the damages, in actions on bonds for the performance of covenants, &c., the plaintiff may have a *scire facias* upon the judgment against the defendant, or against his heirs, devisees or tertenants, or executors or administrators, suggesting other breaches, &c., thereby giving the plaintiff his election against which to issue his *scire facias*. But whatever may be the rule in this respect, the defendants come too late, after a judgment by default, to make their objection. They ought to have availed themselves of it by plea. (2 *Saunders*, by *Wms.* 9. note 10.)

The proceedings on the *scire facias*, and the entry of the judgment, have been regular, and according to the practice of the court.

Per Curiam. This is a motion, made on the part of the defendants, to set aside the *scire facias*, and all subsequent proceedings. On a consideration of the facts, we are of opinion,

ALBANY,
Feb. 1863.
SPEYER
v.
NEW-YORK
INS. COMPANY.

[* 88]

that the motion must be denied. The proceedings on the *scire facias* were regular. The defendants, as *tertenants*, were duly warned, and suffered judgment to pass against them by default. The return to the *scire facias* by the sheriff of the county, where the lands lie, states them to be "tenants of the lands in his bailiwick, whereof *Crosby* was seised, on the day of the rendition of the judgment in the original suit." If the rule be, as stated in the books, that the heir and the personal representatives of *Crosby* ought to have been previously warned, yet the *tertenants* ought to have availed themselves of this omission by plea, and they come too *late, after judgment by default. (2 *Saunders*, by *Williams*, p. 9. note 8. and 10.) They are also equally too late to be heard upon the allegation, that they were not such *tertenants* as ought to have been summoned upon the *scire facias*. There is the more reason for denying the motion, as there are no merits disclosed, or averred by the defendants, either in behalf of themselves, or of the legal representatives of *Crosby*; and from the affidavit of the attorney of the defendants, it appears, that a previous *scire facias* against the executors, or the heirs of *Crosby*, would have been unavailing and fruitless, for it is stated, that neither of them have resided within this state, since *January*, 1806.

Some circumstances are mentioned, in the affidavits on the part of the defendants, relative to the original judgment, but as the motion before the court does not apply to that judgment, it becomes unnecessary to take notice of those suggestions.

Rule refused.

SPEYER against THE NEW-YORK INSURANCE COMPANY.

Goods were
insured from
New-York to
Bordeaux.
[* 89]

The policy contained the usual printed clause,

"to be free from any loss which may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade;" and also the following written clause: "warranted not to abandon, if turned away, nor if captured, until condemned." While on her voyage, the vessel was captured and sent into England. On the 18th of November, 1803, the ship and cargo were released, and the ship afterwards proceeded on her voyage, and reached Verdun, in France, at the entrance of the Garonne, the 16th of January, 1804. The vessel and cargo were seized and detained by the officers of the French government at Bordeaux, and she was not suffered to unlade any part of her cargo, and was afterwards ordered to leave the territory of France; the reason assigned for the prohibition and sending away, was, that the ship had come directly from England. The ship and cargo, by order of the consignees, went to St. Sebastian's, in Spain, where part of the cargo was sold, and the ship afterwards went to Bordeaux, in ballast, and the residue of the cargo, unsold at St. Sebastian's, was shipped to Bordeaux, and there sold. On being advised of the situation of the vessel and cargo at Bordeaux, the insured abandoned, on the 18th of May, 1804, as for a total loss. It was held, that under the written clause in the policy, the insured was not entitled to recover as for a total loss, but only for a partial loss, for expenses and average, from the time of capture, until her arrival at Bordeaux. But as to the effect of such a prohibition, without such a special clause in the policy -

to the opinion of the court, on the following case: The policy was dated the 24th of *August*, 1803, and the cargo was valued at 3,370 dollars, the sum insured. At the foot of the policy there was the following clause in writing: "*Warranted not to abandon, if turned away; nor if captured, until condemned.*" The rest of the policy was in the usual printed form. It was proved (but the question as to the competency of the proof reserved) that the terms *turned away*, as understood by assurers and assured generally, and by the parties, at the time, meant a restraint or hindrance of the vessel from proceeding to her port of destination, by a blockading force, and was not understood to apply to the restraints or acts of the government, at the port of destination. The ship sailed from *New-York*, the 28th of *August*, 1803, on the voyage, with the cargo on board, belonging to the plaintiffs; and both ship and cargo were *American*. On the 3d day of *October*, 1803, she was boarded, detained, and sent into *England*, on suspicion of having enemy's property on board. She arrived at *Bristol* in *England*, the 22d of *October*, 1803; and on the 18th of *November*, the ship and cargo were released, on payment of the expenses. The ship then proceeded on her voyage, and on the 16th of *January*, 1804, she reached *Verdun*, at the entrance of the *Garonne*, and was there detained by the *French* commodore, until the 27th of *January*, and then ordered to leave the river; because the orders of the *French* government were, not to permit any vessel coming direct from *England* to enter a *French* port. The vessel was preparing to leave the river, when the ship and cargo were seized by the *French* officers of the customs, and sent up to *Bordeaux*, and there detained, until the 13th of *March*, 1804, when they were released; but the master was forbidden to unlade any part of his cargo, and ordered to depart from *France*. The cause of this *conduct on the part of the *French* government was, that the ship had come directly from *England*, and the fact of the forcible carrying into, and detention in *England*, was not allowed to be any excuse. The ship then proceeded, by order of the consignees, to *St. Sebastian's*, in *Spain*. Having left *Bordeaux* the 18th of *April*, she arrived at *St. Sebastian's* the 21st of *April*, 1804, where the cargo was delivered to a mercantile house, to which the master was addressed. On the 10th of *May*, the ship sailed for *Bordeaux*, in ballast. Fifty-six bags of cocoa, and 14 bales of cassia, belonging to the plaintiff, were sold at *St. Sebastian's*; but as sales could not be made there, without great sacrifice, the residue of the cargo was, on the 24th of *August*, 1804, shipped to *Bordeaux*, where it arrived early in *September*, and a part was sold in *September*, and part in *January* following. The plaintiff, being advised from *Bordeaux*, by a letter, dated the 30th *March*, 1804, of the situation of the vessel and cargo, abandoned, on the 18th of *May*, 1804, and made the usual proofs

ALBANY,
Feb. 1808.
SPEYER
V.
NEW-YORK
INS. COMPANY

[* 90]

ALBANY,
Feb. 1898.

SPEYER
v.
NEW-YORK
INS. COMPANY.

of loss and interest. Large expenses were incurred, during the detention at *Bordeaux*, which were general average.

It was submitted to the court to decide whether the plaintiff was entitled to recover for a total or partial loss, or for a total loss and average, or for a partial loss and average, and in either case, the court might appoint two persons, to adjust the amount and average, and report the same to the court.

S. Jones, jun. for the plaintiff. There can be no doubt that the plaintiff is entitled to recover for his proportion of the expenses and charges, consequent to the capture by the *British*, and also for the expenses and average loss occasioned by the arrest and detention in *France*. The main question is, whether the acts of restraint of the *French* government do not furnish a just ground of abandonment, so as to entitle the plaintiff to recover for a total loss. That this is a peril within the policy, is evident from the language of the instrument itself. The words are general; *arrests, restraints* and *detainments* of all *kings, princes, &c. This applies to all kinds of restraint, not caused by the act of the insured.

The contract of insurance continues until the goods are safely landed. It continues during a quarantine, or any other necessity or peril, which prevents the landing of the cargo. The going to *St. Sebastian's* was compulsory, and a necessary consequence of being ordered to depart from *France*. The insurer, by his contract, undertakes for the entry at the port of delivery, unless prevented by some fraud or misconduct of the insured. The words of the policy apply to all restraints; as blockades, embargoes, &c. An *embargo* is considered not only as a prohibition to depart, but an exclusion of ships from entering the ports; and, in either case, is a just cause of abandonment. (*Park*, 78. *Lex Mer.* 4th ed. 268.) Unless, therefore, there is some special clause in the policy, to restrain the general words, they must be considered as protecting the insured in this case.

The printed clause is, "to be free from any loss which may arise, in consequence of a seizure or detention for, or on account of, any illicit or prohibited trade." Here was no attempt to trade; the going with goods from *England* to *France* was not voluntary, but resulting from the capture. The plaintiff cannot be said to have violated the true spirit and meaning of the *French* ordinance; for where a person is compelled by superior force, to do a certain act, he cannot be said to be guilty of an offence. Necessity always excuses, in cases of insurance. The insured, therefore, cannot be said to come within the printed clause, as to illicit trade.

Then, what is the meaning of the written clause, as to being *turned away*? It must refer to a case of blockade; the belligerent ships always endorse on the register, the words "turned away."

Hoffman. This point is not disputed.

Jones. We contend, then, that the arrest, at the mouth of the *Garonne*, and the denial of liberty to land the cargo, created a just cause of abandonment, and that all the subsequent proceedings, which were a consequence of the *vessel's being ordered away, were at the risk of the defendants.

ALBANY,
Feb. 1808.
SPEYER
V.
NEW-YORK
INS. COMPANY
[* 92]

Hoffman and *Harison*, contra. Though the right to claim an average loss is not disputed, it is necessary to decide on its extent, or the principle by which it is to be computed.

As to the abandonment. Every nation or sovereign has a right to allow or refuse trade with other nations, except on certain terms or conditions. This right may be exercised illiberally, or improperly; still the nation is to judge as to the propriety of the measure, and is not accountable to any other for its conduct. The insured, after the capture, knowing of the prohibition of the *French* government, was not bound to proceed to *France*, but might have put an end to the voyage. If the *French* had seized the vessel for illicit trade, would it not have been within the clause contained in the policy? But the vessel was, in fact, restored and in the possession of the master, in *May*, 1804, so that the abandonment could not be made on account of any *arrest* or *seizure*. If the insurer is to be made answerable for a total loss, as a consequence of the capture, then the clause in the policy against abandonment, in case of capture, until after condemnation, would be nugatory. The question, then, is reduced to this, whether a mere denial of entry, or to trade, at the port of delivery, is a peril within the policy. The right of the *French* government to refuse an entry to vessels, so circumstanced, is not to be controverted here. In the case of *Suydam & Wyckoff v. The Marine Insurance Company*, (1 *Johnson*, 181.) it was decided, that a denial of entry at *St. Jago de Cuba* was not a peril within the policy. The same principle is recognized in *Schmidt v. The United Insurance Company*. (1 *Johnson*, 249.) The refusal may, perhaps, excuse a deviation, in going to another port, on the ground of necessity; but the insured take upon themselves the risk of the right to trade. There is not a case to be found, where it has been decided, that a denial of entry, or to trade, was a ground for abandonment. If, then, the refusal of an entry, or a permission to trade, is not a peril within the policy, the capture, or its consequences, will not vary the question. (*Scott v. Thompson*, 1 *Bos. & Pul. N. S.* 181.)

**Jones*, in reply. A refusal of an entry is a refusal to permit the goods to be landed. If they cannot be landed, the voyage is defeated and lost, without any fault of the insured, who has a right, therefore, to abandon. In the case of *Suydam & Wyckoff v. The Marine Insurance Company*, it was admitted,

[* 93]

ALBANY,
Feb. 1808.
SPEYER
V.
NEW-YORK
INS. COMPANY.

that the trade with *Cuba*, a *Spanish* colony, was generally prohibited; and Mr. Justice *Livingston*, who appears to have had serious doubts, decides on the circumstances of that case, which are different from the present.

The true meaning of the clause relative to capture is, that, in that event, the insured is to wait the decision of the court, and not abandon, unless there be a condemnation. If carried to the extent contended for by the other side, the insured could not abandon, if the vessel had been released after a capture, even though she should be afterwards lost by the perils of the sea. It does not appear, from the case, that the insured had any knowledge of the *French* decree. Even had it been known, it was fairly to be presumed, that it would never receive so monstrous a construction, as to exclude vessels bound direct from the *United States* to *France*, that had been forcibly carried into *England*.

KENT, Ch. J., delivered the opinion of the court. This policy is stated to be the usual printed cargo policy, and, consequently, as I understand it, contains the usual printed clause, "To be free from any loss which may arise, in consequence of a seizure, or detention for, or on account of any illicit or prohibited trade." It was upon this clause, that the court determined, in the case of *Suydam & Wyckoff v. The Marine Insurance Company*, (1 *Johnson*, 181.) that the denial of an entry at *St. Jago*, the port of destination, was not a loss within the policy. The policy before us has also another clause, of some moment in the present case, and that is a warranty, "not to abandon, if turned away, nor if captured, until condemned." It seems to be agreed, that the turning away here, applies only to the case of a blockade; and we may waive any consideration of that part of the warranty. The question, *then, is, whether, under the operation of these two clauses of the policy, the plaintiff had a right to abandon, in consequence of the proceedings at *Bourdeaux*, and to claim a total loss, as for a loss of voyage. I cannot distinguish this case from that of *Suydam & Wyckoff v. The Marine Insurance Company*. Here was a seizure and detention, a prohibition to enter, and a turning away, for illicit or prohibited trade; and this was the very case excepted by the policy from the rule. The reason and grounds of this prohibition are not open for investigation. The plaintiff assumed the risk of such a peril upon himself. What would have been the effect of the prohibition without such a special clause in the policy, is another question, on which I give no opinion. The decision in *Suydam & Wyckoff v. The Marine Insurance Company*, was founded on this special warranty in the policy, and I form my present opinion upon the ground of this special provision.

But it is contended, that the prohibition and turning away from *Bourdeaux*, were in consequence of the *British* capture. If this be admitted, it was not a case for abandonment; for no abandonment was to be made, in case of capture, until condemnation. In

my opinion, then, the plaintiff has precluded himself from turning this case into a total loss, and is entitled only to claim a partial loss, for expenses and average, to be computed from the capture, until the arrival at *Bourdeaux*; and a reference must be made to proper persons to adjust and report the amount for which judgment is to be rendered. The defendant cannot be responsible for subsequent events. The risk terminated at *Bourdeaux*, for the policy did not provide for a continuation of risk, in case of a prohibition to enter, founded on an illicit trade, nor for leave for the plaintiff to go elsewhere. The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk, by the landing of the goods. The policy had completely spent itself, when the prohibition intervened. The plaintiffs are to answer only for the previous losses.

ALBANY.
Feb. 1808.

TILLOTSON
V.
CHEETHAM.

Judgment for the plaintiff, for a partial loss.

*TILLOTSON *against* CHEETHAM.

[* 95]

COLDEN, at the last term, in behalf of the plaintiff, moved to amend the record in this cause, 1. By inserting the words, "at the city-hall, in the city of *New-York*," in the memorandum, next after the words, "before the justices, &c., of the same people," and striking out the word "here," after "brought." 2. By striking out of the imparlance "*November in November*," and the words, "*in the year one thousand eight hundred and six*," and inserting the words, "*February* in this same," between the words "of" and "term." 3. By striking out of the default, and interlocutory judgment, the words, "in proper person, and defends the wrong and injury when," &c., and substituting, "although at that day solemnly demanded, came not, nor does he say any thing;" and for the word "whereupon," the word "wherefore." 4. By striking out of the first continuance, the words, "and the said defendant in his proper person." He proposed several other amendments of a similar nature; but the principal one was, the alteration from *November* to *February* term, in the imparlance. He said, that these amendments were all formal, and in those parts of the record, which are supposed to be entered by the clerk. He cited *Col. cases*, 41. 45. 2 *Tidd's Prac.* 644, 645. 1 *Salk.* 270. 3 *Term*, 659. 749. 2 *Lev.* 22.

After an assignment of errors, and joinder, in the Court for the Correction of Errors, this court, on motion, will amend the original record in matters of form, for the original record remains here, the transcript only being sent up with the writ of error. (a)

(a) *Pease et al. v Morgan*, 7 *Johns Rep.* 438. *Reic v Barker*, 2 *Cow Rep.* 438.

Baldwin, contra, read an affidavit, stating, that a writ of error had been brought by the defendant, on the record to the Court for the Correction of Errors, which had been duly return-

ALBANY,
Feb. 1808.
TILLOTSON
v.
CHEETHAM.

[* 96]

ed in *February*, 1797, with a transcript of the record annexed, and filed with the clerk of the Court of Errors; that errors had, thereupon, been assigned generally, and specially, by the plaintiff in error; and that, among other errors, so assigned, were those which the plaintiff in this court now wished to amend; that there had been a joinder in error, by the defendant in that court, in which he alleged, that there was no error in the record *and proceedings; and that, according to the practice of the Court of Errors, a case was prepared, printed copies of which were delivered to the judges of that court, and a day assigned for the hearing of the cause, but on account of the pressure of business before the court, it did not come on to be heard. He contended,

1. That by the common law, no such amendments of the record could be made after the term in which the record was made up. (*Black. Comm.* 407.) By the statute of *jeofails*, (*Laws N. Y.* v. 1. p. 127.) amendments may be made "as long as the record and process remain before the court." By the writ of error, the record is removed from this court to the Court of Errors. It is true, a transcript only is sent up; but, in judgment of law, that is the record. (*Wolfe v. Horton*, 3 *Caines*, 87.) The words of the act, declaring that the record may be amended, as long as it remains before the court, supposes that it may be removed. The transcript before the Court of Errors is always regarded as the record itself. (*Rex v. North*, 2 *Salk.* 565.) The original record is kept by this court to prevent its being lost, and for the purpose of executing the judgment of the Court of Errors; but, for every other purpose, the transcript is considered as the record removed from the court below.

2. Admitting that this court has power to amend the record, the plaintiff is too late in the application, after having pleaded, in the court above, *in nullo est erratum*, thereby admitting the record to be perfect. (1 *Salk.* 269, 270. 1 *Johnson*, 493.) He cannot now allege diminution. Alleging diminution is merely for the purpose of supplying defects; but after a joinder in error, you cannot allege defects in the record, and pray a *certiorari*. A *certiorari* is to obtain copies of the proceedings not contained in the general record. Diminution cannot be alleged, because there are matters erroneously stated on the record; for this would be allowing the party to question the truth of the record; and you cannot allege diminution, contrary to the record that is certified. (2 *Bac. Abr.* 469. *Error*, *E. Roll. Abr.* 764. 2 *Roll. Rep.* 200. 353.) Where some part of the proceedings are omitted, amendments may be made, and a *certiorari* awarded for that purpose; but nothing can be returned that is inconsistent *with the first record. In the case of *Petrie v. Hannay*, (3 *Term*, 59.) which is the strongest case to be found in favor of amendments, there was a mere slip of the clerk, in not entering up the judgment on the second plea. In *Price v. Evers*, (*Cole. Cases*, 41.) the Court of Errors amend

[* 97]

ed the transcript, and remitted it to this court, that the record here might be amended in the same manner.

4. Again, there is nothing in this court to amend by; and amendments are never allowed, unless there be something by which they may be made. It would be unreasonable to allow the record to be amended, so as to defeat the writ of error, and throw the costs upon the plaintiff in error: and how is this amended record to be sent to the Court of Errors? If there be a new transcript, there will then be two records before that court; and which of them is to be regarded as the true one?

5. If the errors be merely formal, as is alleged, then there is no need of amending the record, for errors in form are cured by the statute of *jeofails*, and may be amended, or disregarded, by the court into which the record has been removed. Again, if this court can amend its errors, in cases like the present, there will be no use of a court for the correction of errors; and what is to prevent this court from amending the record, in matters of substance, as well as of form?

Colden, in reply. The record always remains in this court; for, by the statute, (*Laws N. Y.* v. 1. p. 184.) a transcript only is sent up to the Court of Errors. It is never too late to make an application to amend, until after judgment in error. There are numerous cases, in the books, of amendments, allowed after error brought. (3 *Term*, 349. 7 *Term*, 474. 2 *Burrow*, 2730.) The case of *Tully v. Sparkes and others* (2 *Ld. Raym.* 1570. S. C. 2 *Str.* 867.) is strongly in point. In that case, there was a writ of error from the Court of *K. B.* to the Exchequer Chamber, and when the court were ready to give judgment, it was moved to amend the record; but the court said, that it could not be done, and that it must be amended in the *K. B.* A motion was afterwards made, in the Court of *K. B.*, to amend the record, and it was objected, that the record was not in the *K. B.*, but had been removed into the Exchequer Chamber; that it was not a clerical mistake, but an error in matter of judgment, and that the application was too late, after the cause had been twice argued in the Exchequer Chamber; but the Court of *K. B.* overruled all these objections, and allowed the amendments; and at the next term, the transcript was amended by the record in the *K. B.* and the judgment affirmed. The court will always intend, that the entries on the roll are made by the clerk, and that he has minutes, by which the amendments can be made.

KENT, Ch. J., delivered the opinion of the court. This is a motion for leave to amend the record of judgment, upon the execution of a writ of inquiry of damages, in this cause. The final judgment was given in *November* term, 1806, and a writ

ALBANY,
Feb. 1808.

TILLOTSON
V.
CHEETHAM

[* 98]

ALBANY,
Feb. 1808.

TILLOTSON
v.
CHEETHAM.

of error was thereupon issued, and in *February*, 1807, duly returned into the Court of Errors, with a transcript of the record annexed. At the last session of the Court of Errors, errors were assigned, and among others, that by the record, it appeared, that an imparlance was given to the defendant, and a continuance entered from *November* term, 1805, to *November* term, 1805, before the court at *Albany*, and that interlocutory judgment was then and there entered. To this assignment of errors, a joinder was put in, alleging, that there was no error, and in this situation, the cause stood in the Court of Errors, at the time of making the present motion.

It is evident, that the record itself, in judgment of law, as well as in fact, remains in this court, and that only a transcript is sent up with the writ of error. This is the direction of the act, organizing the Court for the Correction of Errors. (*Laws N. Y. v. 1. p. 184.*) This court may, therefore, amend the original record, notwithstanding a transcript of it is in the court above, and in the case of *Tulley v. Sparkes*, (2 *Ld. Raym.* 1570. 2 *Str.* 869.) it was not only so ruled in the Court of *K. B.*, after solemn argument, *but the amendment was made, in matter of form, after argument upon joinder in error, in the court above, and with the unequivocal approbation of that court, who allowed the transcript to be amended, according to the amended record in the *K. B.* That case is so perfectly in point, that it seems to me to put an end to all doubt about the propriety of granting the present motion. The case of *Grenville v. Smith*, (*Cro. Jac.* 628.) and the several cases cited in 1 *Roll. Abr.* 208. *l.* 45. 50. and 209. *l.* 15. 25. prove, that this decision in Lord *Raymond* was in strict conformity with the ancient practice, and that the Court of Errors used to give the like effect to amendments. The subsequent cases of *Petrie v. Hannay*, of *Doe v. Perkins*, (3 *Term*, 659. 749.) and of the *Lessee of Lawlor v. Murray*, (*Schoales & Lefroy*, 75.) show that the practice is still familiar under the *English* law, after error brought, and after issue joined in the Court of Errors. This practice of amendment rests in the sound discretion of the court, and is extremely conducive to the furtherance of justice. It would be disgraceful to our judicial proceedings, if mere clerical mistakes, in matters of form, were not susceptible of a ready redress, or if they were permitted to defeat a recovery, upon the merits of a cause. The Court for the Correction of Errors, under the influence of a liberal disposition to correct mistakes in form, permitted even the *transcript* of a record to be amended in that court, and directed the amended transcript to be sent to this court, to the end, that the original record remaining here might be amended. (*Price v. Evers, Coleman's Cases*, 41.)

The court are of opinion, accordingly, that the motion ought to be granted, upon the payment of the costs of this motion ;

and if the writ of error be discontinued, or *non pross'd* in consequence of the amendment, upon payment, also, of the costs in error.

ALBANY.
Feb. 1803.

POWELL
v.
BROWN.

Rule granted.

**POWELL against J. BROWN.*

[* 100]

THIS was an action of *assumpsit*. The declaration contained three counts. The first count stated that, on the 28th June, 1804, and before that time, and until the death of one *Watson Brown*, the plaintiff, one *Israel Underhill*, and the said *Watson Brown*, were joint owners of a certain sloop, or vessel, called the *Rising Sun*; that the plaintiff, the said *Underhill* and *W. Brown*, agreed together that they should be sharers in the earnings and profits, losses and expenses of the said vessel, in a voyage about to be prosecuted, in proportion to their respective interests in the said vessel, her outfits and cargo; which agreement continued in force, until the death of the said *W. Brown*. That the said vessel, in pursuance of the said agreement, sailed on the proposed voyage to parts beyond the seas, the said *W. Brown* being master; and while prosecuting the voyage, the said *W. Brown*, the master, died on the 10th November, 1804, at *Matanzas*. That after the death of *W. Brown*, on the 2d January, 1805, in consideration, that the plaintiff had undertaken, promised, and agreed to and with the defendant, that the defendant should receive from him, the plaintiff, the effects of the said *W. Brown*, in the said sloop, and her earnings, in like manner as the said *W. Brown* would have been entitled to receive them pursuant to the said agreement, between the owners, and in consideration that the plaintiff had agreed with, and promised the defendant, to account to the defendant, respecting the said vessel, her profits and earnings, loss and expenses, in the *same manner, as he was bound by the said agreement between the owners of the said vessel, to account to the said *W. Brown*, the defendant undertook, promised and agreed to and with the plaintiff, to pay him any demands, or sums of money that were due and owing from the said *W. Brown*, at the time of his death, to the plaintiff, and which are yet due and unpaid, and also any demands which the plaintiff had against the share or part of the said *W. Brown*, in the said vessel. It was then stated,

In an action of *assumpsit*, the declaration stated, that the plaintiff and U. and W. were joint owners of a certain vessel and the cargo, then on a distant voyage, and were jointly interested in her earnings and the profits of the voyage, of which vessel, W. was also master, and died during the voyage, and that after the death of W. the defendant, B., in consideration that the plaintiff had undertaken and promised to the defendant, that he, the defendant, should receive from the plaintiff, the effects of W. in the vessel, and her earnings

[* 101]

ings in like manner as W. was entitled to receive them, according to the agreement among the owners, and in consideration that the plaintiff had agreed with the defendant to account with the defendant, for the said vessel, her earnings, profits, and losses in like manner as he was bound to do to W., the defendant undertook and promised to pay to the plaintiff, any demands or sums of money due and owing from W. to the plaintiff, at the time of W.'s death, and also any demands which the plaintiff had against the share of W. in the vessel; and the declaration set forth a certain debt due from W. to the plaintiff, &c., and averred, that the plaintiff was always ready to perform his part of the agreement. On a demurrer to the declaration, it was held to be bad, as it did not set forth a sufficient consideration for the promise of the defendant.

ALBANY,
Feb. 1808.

POWELL
v.
BROWN.

that *W. Brown*, in his life-time, to wit, on the 28th *June*, 1804, made and delivered to the plaintiff, a promissory note, for 700 dollars, payable four months after date, which was due and unpaid, at the time of his death, and still remained unpaid, of which the defendant, after the death of *W. Brown*, had notice, and by reason of the premises, the defendant became liable: in consideration whereof, he undertook and promised to the plaintiff to pay to him the said 700 dollars, &c., and the plaintiff avers "that he hath, at all times, been ready and willing, well and faithfully, to perform all things on his part by the said agreement, so made as aforesaid, between him and the defendant, to be done and performed."

The second and third counts were like the first, varying only in the description of the sums due from *W. Brown*, to the plaintiff, with a common conclusion. To this declaration the defendant demurred, and the plaintiff joined in demurrer.

P. W. Radcliff, in support of the demurrer. 1. No sufficient consideration is set forth in the declaration, to support the *assumpsit* of the defendant. The agreement is not stated to be in writing, nor was it necessary to aver it to be so; and though presumed to be in writing, yet the plaintiff is bound to set forth a sufficient consideration also in writing. (*Lansing v. M'Killip*, 3 *Caines*, 286. 5 *Term*, 582. 5 *East*, 10. 22.) To make a good consideration for the promise, there must be some benefit to the defendant, or some detriment to the plaintiff. It does not appear in what manner the plaintiff was to account to *Watson Brown*, nor, consequently, to the defendant, nor that he ever did account; *and *non constat*, that *Watson Brown* had any effects in the vessel, or that there were any earnings, or that the defendant would be, in any way, benefited. Besides, the plaintiff promised what he had no legal power to perform, for the personal effects of *Watson Brown*, at his death, belonged to his personal representatives, so that the plaintiff could have no control over them. (1 *Lev.* 262.) Again, it does not appear that any detriment has resulted, or could result, to the plaintiff, or that he has foreborne against *Watson Brown*, or his representatives, or that he has relinquished any right. (*Comyn's Dig. Action on the Case*, B. 1. *Plead. C.* 62.)

2. The promise of the defendant is void for uncertainty. It is too general and indefinite. (2 *Lev.* 152.) It does not appear in what proportion, *Watson Brown* was entitled to receive the earnings and profits. Again, the promise is void, for want of mutuality. The promise of the defendant is not to pay a certain and specific debt of another, but to substitute himself in the place of the other, so as to be liable for all his debts, without knowing, or having the means to know, the amount of them.

3. If the promises are valid and binding, still they can be enforced only in a court of equity. It is sufficient, if a part only of the agreement is cognizable in that court, for the whole must be taken together. (2 *Ventris*, 223. 7 *Term*, 203.)

4. If the promises were valid at law, still the promise of the plaintiff was precedent; and it was necessary for him to aver and prove a performance on his part. (1 *Salk*. 112. *Doug.* 684. 4 *Term*, 761. 7 *Term*, 123. 1 *Saund.* 320. 1 *Johnson*, 148. 2 *Johnson*, 207.) The promises were, at least, mutual and concurrent. The plaintiff must aver every thing necessary to maintain his action; and if he does not, it may be taken advantage of, on a general demurrer. (1 *H. Black.* 123. 1 *Johnson*, 207.)

5. The breach in the declaration is not well assigned. The breach must correspond with the assumption. All the facts stated in the declaration must be disposed of in the breach. A non-performance of the whole must be alleged, or a performance in part admitted, and a want of a performance of the residue alleged. (*Comyn's Dig. Pleader*, c. 44. 47, 48. 2 *V.* 2, 3.) In the breach, no notice is taken of the defendant's promise to pay the charges against *Watson Brown's* share of the vessel.

ALBANY,
Feb. 1808.

PCWELL
V.
BROWN.

**Haves* and *Colden*, contra. The authorities which have been cited, are not disputed; the only question is as to their application. 1. The principal point is, whether there was sufficient consideration for the defendant's promise. In consideration of the money agreed to be paid by the plaintiff, the defendant agreed to pay the debts of *Watson Brown*. This might be beneficial to the defendant. It is enough, if it might be so; for the defendant made his calculation on the ground of a probable, or supposed benefit. Again, it would be detrimental to the plaintiff; for he would be liable to the representatives of *Watson Brown*, for his share, or to his partner. No matter whether the plaintiff can legally perform his promise, or not, for the defendant can compel a performance.

[* 103]

2. A promise to account for the debt of another is not void, for uncertainty. It is enough, that the amount may be made certain.

3. It is no objection to the consideration of a promise, nor does it destroy the effect of such consideration, that it must be enforced in equity. A liability to pay, or to account, in a court of equity, is a sufficient consideration.

4. The promises were entirely independent. The promise of the defendant did not depend on any act to be performed by the plaintiff. No averment of performance was necessary on the part of the plaintiff. In consideration of the plaintiff's promise to account, the defendant promised to pay. It was a promise in consideration of a promise.

5. It is sufficient, that the plaintiff, in the breach, alleges the

ALBANY,
Feb. 1808.

POWELL
v.
BROWN.

non-performance of certain things, without saying that the others have been performed.

[* 104]

P. W. Radcliff, in reply, observed, that there could be no survivorship in the vessel ; nor could the plaintiff dispose of the share of *Watson Brown* ; that the possibility of a benefit to one party, or of detriment to the other, was not a sufficient consideration, but that such benefit, or detriment, must be certain and inevitable ; that if the plaintiff had paid the money, or accounted to the defendant, *he would receive it to the use of the legal representatives of *Watson Brown* ; and that the doctrine of a promise in consideration of a promise, had long since been exploded.

VAN NESS, J., delivered the opinion of the court. Several exceptions on the argument were taken to the substance of this declaration. But, for the purpose of expressing the opinion of the court, it is unnecessary to state any other than the first, viz. That the plaintiff has not set forth a sufficient consideration to support the defendant's promise. The only consideration upon which the defendant's engagement can be supported, if at all, is, that the plaintiff was to account to him for such share of the vessel, cargo and profits, as, upon a final settlement of all the accounts in relation to them, *Watson Brown* would have been entitled to receive, in case he had survived the completion of the voyage. For aught that appears, no liquidation of these accounts has ever been made ; and if made, it does not appear that *Watson Brown* was entitled to receive a cent. The vessel may have perished at sea, or the cargo may have been lost, or some other disaster may have occurred, whereby this adventure has been rendered a losing one. The consideration upon which an *assumpsit* is founded, must be either for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. As it is not averred, that there was a balance due to *Watson Brown*, it is to be taken for granted, that none was due ; it is, therefore, impossible that the plaintiff's promise could produce any benefit to the defendant. There is nothing to show that it actually did, or in any way could, occasion any loss or trouble to the plaintiff. We are of opinion, therefore, that there is no consideration in this case for the defendant's promise ; and as this exception goes to the whole ground of the plaintiff's right of action, there must be judgment for the defendant.

Judgment for the defendant.

ALBANY,
Feb. 1808.

SMITH
v.
ELDER.

*SMITH *against* ELDER.

THIS was a special action on the case. The declaration was in substance as follows: The plaintiff was owner of the *American* ship, the *Factor*, of which one *Caldwell* was master, on the 5th *June*, 1805. The ship was then lying in the port of *New-York*, bound on a voyage to *Greenock* in *Scotland*. The defendant, (who had taken a passage on board of the ship,) without the knowledge or consent of the plaintiff, as owner, or of the master, and contrary to the express orders and advice of the plaintiff, and of the master, clandestinely put on board of the ship a quantity of *India* and *China* goods, consisting of handkerchiefs, teas and nankeens, for the purpose of conveying the same to *Greenock*, there to be by the defendant taken and smuggled on shore, contrary to the commercial laws and regulations prevailing at *Greenock*: the defendant well knowing, at the same time, that the said goods and articles were, by the laws and regulations of *Great Britain*, prohibited, and deemed contraband, when imported into the said port, and city of *Greenock*, in any *American* ship, or vessel belonging to a citizen or citizens of the *United States*, and well knowing, at the same time, that the said goods and articles, if found on board of the said ship, in the port of *Greenock*, by the officers of the customs there, would be liable to seizure, and in consequence thereof, the owner of the said ship would be liable to great pains and penalties, and that the said ship would also be liable to seizure and condemnation. The ship having arrived at *Greenock*, the officers of the customs came on board, and upon searching the ship, discovered the said articles of merchandize, concealed in the possession of the defendant, and thereupon seized the said ship, on account of the articles being found on board, in consequence of which seizure, the plaintiff, in order *to procure the release of the ship, and to prevent forfeiture, condemnation and loss of the said ship, under the laws and regulations prevailing at *Greenock*, was under the necessity of paying, and did actually pay, or cause to be paid, to the collector of the said port of *Greenock*, the sum of 200*l.* sterling, and was put to other charges and expenses, whereby, &c. The defendant pleaded *not guilty*. The cause was tried before Mr. Chief Justice *Kent*, at the *New-York* sittings, in *June*, 1807.

On the trial, it was proved, that the defendant, when the ship was about to sail from *New-York* for *Greenock*, engaged her passage. The master, having had some intimations, which induced a suspicion that she would attempt to carry prohibited goods, expressly cautioned her from putting on board, or at-

In an action of trespass on the case, brought against the defendant, for putting on board of an *American* vessel, bound from *New-York* to *Scotland*, goods which, by the laws of *Great Britain*, were prohibited from being imported into that country, in foreign vessels, in consequence of which, the plaintiff's vessel was seized in *Greenock*, and the master compelled to pay a large sum of money, to procure her release; it was held, that the action was maintainable here, and that, even if this court had no jurisdiction, it was too late, after a plea in bar, to object to the jurisdiction. On a motion for a new trial, the defendant

[* 106] cannot object to the form of action. (a) The confession of the defendant, that she did carry *contraband goods* in the vessel, and that the vessel was seized in consequence, and the testimony of the master, that the goods so carried were *contraband*, by the laws of *Great Britain*, were deemed sufficient evidence, in this case, of the law of that country

Britain, were deemed sufficient evidence, in this case, of the law

(a) *Sargent v. —*, 5 *Cow. Rep.* 114, 115.

ALBANY.
Feb. 1808.

SMITH
v.
ELDER.

[* 107]

tempting to carry with her to *Greenock*, any goods of the produce or manufacture of *India* or *China*, and particularly *teas*, *nankeens* and *silks*, as they were contraband, by the laws of *Great Britain*, and would, if found on board, in *Scotland*, subject the vessel to seizure and condemnation. On the arrival of the vessel at *Greenock*, the officers of the customs, on searching the ship, found in the defendant's trunk several rolls of nankeen and *India* silk, and in her bed thirty pieces of *Bandana* handkerchiefs, and under one of the births in the state-room, thirty canisters of tea, and two demijohns of liquors. The ship was immediately seized, and the plaintiff was obliged to employ counsel, and, after repeated applications at the board of customs at *Edinburgh*, the vessel was liberated, on the payment of 200*l.* sterling, and all fees, after being detained twenty-five days. On the goods being found in the possession of the defendant, the plaintiff remonstrated with her on the impropriety of her conduct, upon which she wrote the following paper, addressed to the master, which was read in evidence on the trial: "As the ship *Factor* has been put under stoppage, on account of sundry articles of contraband goods being found on board, part of which is my property, and was taken on board without *your knowledge, or belief, and that you had repeatedly put the question to me whether I had any thing of the kind on board or not, I denied having any thing, and, therefore, oblige my heirs, and successors, to pay all costs, damages and expenses, which you or the owner of the ship shall sustain, on account of the said goods being found on board. *July* 8th, 1805." Signed "*Anne Elder*."

The counsel for the defendant then moved for a nonsuit, 1. Because the declaration was for a *tort*, and the evidence was not sufficient to prove a *tort*, inasmuch as *tort* or misfeasance can only be committed in contravention of the law of nature, or of the laws of the country in which the suit is instituted. 2. As by the paper produced, there was a special contract for an indemnification by the defendant, the action should have been brought on the contract; but the judge overruled the objections.

The plaintiff then offered in evidence of the revenue laws of *Great Britain*, as stated in the declaration, a printed book, entitled, "*The Law of Shipping and Navigation*," by *John Reeves, Esq.*, printed in *London*, as containing the laws on the subject. The defendant's counsel objected, that such evidence of the laws of *Great Britain* was inadmissible.

The plaintiff then proved, by the testimony of the master, that he had been a long time in the *Greenock* trade, and had always understood and believed, that it was contrary to the revenue laws of *Great Britain* to import, in *American* bottoms, articles of the description above stated, and that the importation of such articles would subject the vessel to seizure and condemnation; and that he had known several seizures, for

the same cause, as in the present case. The plaintiff would have produced further *parol* evidence of the revenue laws of *Great Britain*, on this subject, by commercial characters, then in court; but the chief justice thinking *Reeves's Law of Shipping and Navigation* sufficient for the purpose, it was accordingly read in evidence; and the jury, under the charge of the *judge, on the whole evidence, found a verdict for the plaintiff for 1,150 dollars.

A motion was made, at the last term, to set aside the verdict, and for a new trial.

ALBANY,
Feb. 1808.

SMITH
v.
ELDER.

[* 108]

T. A. Emmet, for the defendant. 1. The act done by the defendant was not contrary to the laws of this country, nor can it be considered as unlawful here; nor was the damage to the plaintiff a consequence of the unlawful manner of doing an act in itself lawful. There has been, then, no *tort*; but the declaration is for a *tortious* act. No such suit can be maintained, where the act is lawful, or where there is nothing unlawful, or improper, in the manner of doing the act. (2 *Black. Com.* 208. *System of Pleading*, 459. 1 *Com. Dig. Action on the Case*, B. 3.) An action on the case will not lie for an act not prohibited or unlawful, though it may prove injurious to the party. It is *damnum absque injuria*. Again, the damage arose out of this state, and in a country having competent tribunals to afford redress. It was not the consequence of any thing done here; for it was the carrying the goods to *Greenock*, that produced the seizure; if the vessel had been lost, or had gone to *Madeira*, no injury would have ensued. The damage, and the cause of damage, both arose out of the jurisdiction of the state. No action on the case will lie, for any act done in a foreign country, unless in violation of some personal right, or of some contract. (2 *Wils.* 314.) There are some cases, it is true, in which courts have taken cognizance of actions where the damage or injury complained of arose out of their jurisdiction; but these have either been on contracts, or where a trespass has been committed in a country, in which there existed no tribunal to afford redress.

Suppose an *American*, in *London*, should attempt to put wool on board of an *American* ship, for exportation, and the vessel should be, in consequence, seized and condemned, could an action be brought in this court by the owner, against the person who had violated the commercial laws of *Great Britain*? There is no law here, against carrying *India* or other goods to *England*; and where there is no law, there is no transgression. (2 *Inst.* 170.) Again, suppose an *American* passenger, *on board of an *American* ship, should take *English* goods from *England*, to *France*, and the vessel should, for that cause, be seized and condemned in that country, would any action lie, in this country, against the party?

[* 109]

ALBANY,
Feb. 1808.

SMITH
v.
ELDER.

2. There was no competent or legal proof of the laws of *Great Britain*, on this subject. The laws of a foreign country cannot be taken notice of by the courts here, unless proved by written documents, or proper witnesses. (1 *P. Wms.* 431 *Peake's N. P.* 18.) In the case of *Bethlinck v. Schneider*, (3 *Esp. Rep.* 58.) Lord *Kenyon* said, that the laws of a foreign country could not be proved by persons casually picked up in the street, but by proof duly authenticated, obtained from the country, whose laws were proposed to be proved. He mentioned the case of *Morris*, who married the daughter of Lord *Baltimore*, in *Holstein*, in which the laws of *Holstein* were proved by documents, properly authenticated. So in *Hulle v. Heigtmann*, (4 *Esp. Rep.* 79.) Mr. Justice *Le Blanc* refused to permit the laws of *Denmark*, contained in a written ordinance, relative to seamen, to be proved by the *Danish* consul. In the case of *Kenney v. Vanhorne* and *Clarkson*, (1 *Johnson*, 385.) decided by this court, the distinction in the *English* courts was recognized, that though the *common* or *unwritten* law of a foreign country might be proved by intelligent witnesses of the country whose laws were to be proved, yet *parol* evidence of the *statutes*, or written ordinances of such country, was inadmissible. There must, then, be documentary evidence of a foreign statute. The printed book of Mr. *Reeves* was no evidence; had that gentleman himself been offered as a witness at the trial, his testimony could not have been received, to prove the statutes of *Great Britain*. His book, however respectable, is inferior to his own testimony, for that would be delivered on oath; and his book appears without any such sanction. How is it to be ascertained, that the volume offered was even a true copy of the original manuscript of the author? It may have been a printed copy, from another printed copy. The plaintiff ought to have procured an exemplification, or *sworn copy of the *British* statute, relative to the subject in question.

* 110]

A. Bleecker and *Hoffman*, contra. 1. An application for a new trial is to the discretion of the court, which is never exercised on a mere mispleading, but the party is left to seek his remedy, by motion in arrest of judgment, or a writ of error. There is no objection to the justice of the plaintiff's claim; and it is enough, that there is a verdict for the plaintiff on the merits. But, in truth, the present is the only proper form of action. The action on the case is a beneficial remedy, transitory in its nature, as much so, at least, as *trespass* or *trover*. It has been decided, that *trover* will lie in *England*, for a conversion in *Ireland*; (3 *Mod.* 322. And see 4 *Term*, 503.) and *trespass* has been brought in *England*, for a false imprisonment in *Minorca*. (*Mostyn v. Fabrigas*, *Cowp.* 161.) The case of *Rafael v. Verelst* (2 *Wm. Black.* 1055.) was an action of *trespass*, brought in *England*, by the plaintiff, who was an *Armenian*

merchant, against the president of *Bengal*, for procuring, by awe, fear and influence, and contrary to his own inclination, a sovereign and independent prince, the *nabob* of *Owd*, to imprison the plaintiff, who was one of his own subjects. It would seem strange, then, that the present action could not be maintained, merely because the ship in which the mischief originated happened to be in a foreign country, where the damage was sustained. This suit is not brought for an offence in exporting contraband goods, or for a fine or penalty in transgressing a foreign law, nor to vindicate the commercial laws of *Great Britain*; but for an act done by the defendant, knowingly and wantonly, to the injury of the plaintiff. The wrongful act was commenced in *New-York*; but if, considered as commenced in *Scotland*, still an action will lie here, for the damages which have been sustained. Lord *Kames*, (*Principles of Equity*, vol. 2. p. 326.) in speaking on the subject of the jurisdiction of the courts of *Scotland*, in respect to foreign matters, observes, "that the proper place for punishment is where the crime is committed; but a claim for reparation, arising from a foreign delinquency, is different; being founded on the rules of common justice, it is *a claim that undoubtedly belongs to the jurisdiction under consideration. No man, who injures another, ought to reckon himself secure any where, till he make reparation; and if he be obstinate or refractory, justice requires, that he be compelled, wherever found, to make reparation." A person, it is true, may do what he pleases with his own property, but not so as to injure the property of another. That the plaintiff has sustained a great injury, and that the defendant is the sole and culpable author of that injury, cannot be doubted. The plaintiff is entitled to redress somewhere, and why not in this court? The defendant is not deprived of any advantage of which she might avail herself in *Scotland*. Whatever would be a justification where the offence was committed, will be a justification where the offence is tried. (*Cowp.* 173.) Had *assumpsit*, or any other form of action been brought, the same objections might have been made, as have been raised in the present case; and in estimating the damages, the same reference would have been made to the laws of *Great Britain*. Again, the objection to the jurisdiction comes too late after a plea in bar, and a verdict. (2 *Mod.* 273. *Cowp.* 166. 172.)

2. The averment in the declaration, that the act of the defendant was contrary to the law of *Great Britain*, was unnecessary. It would have been sufficient to have stated, that the goods and ship were liable to seizure by the custom-house officers, and that they were seized. It was not necessary, therefore, to prove the statute law of *Great Britain*. Material averments only need be proved, in this action. The defendant is not charged with violating the laws of *Great Britain*, but with an act which she knew, at the time, was wrong, and would, if discovered, prove injurious to

ALBANY,
Feb. 1808.

SMITH
V.
ELDER

[* 111]

ALBANY,
Feb. 1808.

SMITH
v.
ELDER.

[* 112]

the plaintiff. Her knowledge of the law, and of the impropriety of the act, is evident, from her whole conduct, and her written declaration puts her knowledge beyond all question. Why, then, should the plaintiff be put to the expense, and delay, of procuring documentary evidence of *British* statutes when the defendant confesses her knowledge of the laws, and the injury *she has done to the plaintiff, by a transgression of them? It was enough to prove the seizure, for the cause alleged; and it was then incumbent on the defendant to show, that the seizure was unauthorized. The cases cited by the other side are not applicable. In all of them, the defendant sets up the foreign law, in order to defeat the title of the plaintiff, acquired by the law of the country where the suit was brought. Resting his whole defence on the law of a foreign country, in opposition to the domestic law, the *English* court, and this court, very properly, required the proof of such law to be made out by the most authentic documents. Though the local regulations, or municipal laws of a foreign country, are generally to be proved as facts, and authenticated by written documents; yet where a foreign statute or ordinance relates to the commercial intercourse with other nations, and affects the subjects of all nations, it may be considered as a general law, known to all the world, and may be proved by parol. In the case of *Talbot v. Seeman*, (1 *Cranch*, 38.) the Supreme Court of the *United States* seemed to think, that the marine ordinances of a foreign nation might be read without being proved; and they decided, that a public decree of the government of *France*, on a subject of common concern to all nations, having been promulgated by the government of the *United States*, as a law of *France*, might be read without proof. The marine ordinances of *France* are often read from *Va in*; and, in cases of insurance, at *nisi prius*, before the judges of this court, the ordinances of *Spain*, in relation to her colonies, have been allowed to be proved by parol.

[* 113]

Emmet, in reply, observed, that the case of *Talbot v. Seeman* was in the Admiralty Court, which is bound to take notice of the maritime laws of all countries: and that the copy of the *French* decree was taken from the office of the secretary of state, and authenticated by the act of the government of the *United States*. Courts of common law are not bound to know the laws of foreign *countries; but they must be produced duly authenticated and proved.

VAN NESS, J., delivered the opinion of the court. A new trial is moved for, in this cause, upon two grounds.

1. That as the plaintiff had declared in *tort*, the evidence was not sufficient to prove it, inasmuch as an action for a misfeasance, or *tort*, cannot be maintained for an act done merely in contravention of the revenue laws of *Great Britain*

2. A book entitled, "*The Law of Shipping*," &c. was not legal evidence of the statute laws of *Great Britain*, and that parol evidence thereof could not be received.

The defendant cannot avail herself of the first ground, on a motion for a new trial. If the plaintiff has not disclosed, in his declaration, a cause of action, cognizable by this court, that must be taken advantage of in another way. The judge, at the trial, was authorized to try the issue of fact only, between the parties, and was not to decide, whether the facts set forth in the declaration, if true, would, or would not entitle the plaintiff to judgment, on the return of the *postea*. But I think, if this objection were permitted to be urged, on a motion for a new trial, that it comes too late. It is not denied that, in consequence of the acts of the defendant, the plaintiff has been greatly damaged; and it is conceded, also, that the courts of *Great Britain* would be competent to redress the injury the plaintiff has sustained. But the jurisdiction of this court is denied. The defendant has submitted to the jurisdiction of this court, and by pleading a plea in bar, has, in fact, affirmed it, and is, therefore, now precluded from making the objection. To this point, the cases are full and explicit. (*Mostyn v. Fabrigas*, *Cowp.* 72. *Co. Lit.* 127. *b. Barrington v. Venables*, *1. Raym.* 34. *Trelawney v. Williams*, 2 *Vern.* 484.) For these reasons, we are of opinion, that, upon the first ground, a new trial ought not to be granted. We wish, however, not to be *understood as entertaining the least doubt of our jurisdiction in this case.

The other point is equally clear. It is not necessary, on this occasion, to decide what evidence we should require of the statute law of *Great Britain*, or the written law of any other country. Here the defendant has, in writing, confessed that these goods were shipped contrary to the laws of the country to which they were carried. She calls them "*contraband goods*," and stipulates to indemnify the plaintiff for all the injury he may sustain, in consequence of her misconduct. (a.)

The master of the ship proves (and to his testimony there does not appear to have been any objection at the trial) that it was contrary to the revenue laws of *Great Britain* to import, in *American* bottoms, goods of the description of those in question, and that such importation would subject the vessel to seizure and condemnation. This evidence of the revenue laws of *Great Britain*, in my opinion, was abundantly sufficient, without reading *Reeves's Law of Shipping*, in support of it. The court are, therefore, of opinion, that a new trial ought to be denied.

Rule refused. (b)

(a) See *Lincoln v. Battelle*, 6 *Wend. Rep.* 483.

(b) THOMPSON, J., was absent from indisposition.

ALBANY,
Feb. 1808.

SMITH
v.
ELDER.

[* 114

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

*JACKSON, *ex dem.* THE RECTOR, CHURCH WARDENS &C. OF ST. GEORGE'S CHURCH, IN THE PARISH OF NEWBURGH; THE TRUSTEES OF ST. GEORGE'S CHURCH, IN SAID PARISH; THE TRUSTEES OF THE PARISH OF NEWBURGH; and CAVE JONES, *against* MICHAEL NESTLES.

in an action of *ejectment*, on several demises, (one of which was from the trustees of the parish of *Newburgh*, elected under an incorporation pursuant to the act of the legislature to provide for the incorporation of religious societies, passed in *March*, 1801,) to recover the possession of 100 acres of land, part of 500 acres, granted by a charter of incorporation, in 1752, for the use of a minister of the church of *England* against the tenant claiming to hold under the trustees of the same parish, elected pursuant to an act of the legislature, passed in *April*, 1803,

[* 116]

relative to the said glebe; it was held, that the lessors of the plaintiff were not entitled to recover the premises against the tenant in possession.

THIS was an action of *ejectment*, for lands in the village of *Newburgh*, in the county of *Orange*. The cause was tried at the *Orange* circuit, before Mr. Justice *Tompkins*, on the 26th *November*, 1806. The lessors of the plaintiff claimed the premises in question, as parcel of 100 acres of land, belonging to an Episcopalian minister, duly inducted, as rector of *St. George's* church in the parish of *Newburgh*.

On the trial, the lessors of the plaintiff produced in evidence a grant or charter, from *George II.* dated the 26th *March*, 1752, which recited a petition from *Alexander Colden* and *Richard Albertson*, trustees, and others, proprietors and inhabitants of a tract of land, called the *Newburgh* patent, setting forth, among other things, that letters patent had been granted of a tract of land containing 2,190 acres, within the said patent, to eight palatines, and their families, which letters patent had granted a glebe of 500 acres of the said tract, to two of the said palatines, and their successors for ever, as trustees for the benefit of a *Lutheran* minister, to have the care of souls of the inhabitants of the said tract of 2,190 acres of land; that all the said palatine families had sold their several lots to the petitioners, and had removed into the county of *Albany*; and that after their removal, the male inhabitants of the said tract above the age of twenty-one years, had met and elected the said *Alexander Colden* and *Richard Albertson*, trustees of the said glebe of land, who took possession thereof; And further reciting, that the said trustees, with the consent of the proprietors and inhabitants of the said tract, had, by deed, dated the 14th **March*, 1752, surrendered up the said letters patent, so far as it related to the said glebe of 500 acres of land, and the incorporation of the said trustees. The said charter then constitutes the said *Alexander Colden* and *Richard Albertson*, and their successors, a body corporate, by the name of the "trustees of the parish of *Newburgh*," and "grants and confirms unto the said *Alexander Colden* and *Richard Albertson*, trustees of the parish of *Newburgh* aforesaid, and to their successors for ever, to and for the benefit and behoof of a minister of the Church of *England*, as by law established, to have the care of souls of the before recited tract of 2,190 acres of land, and of a schoolmaster, to teach and instruct the children of the said inhabitants of the aforesaid tract; the said 500 acres of land, lying and being in

Ulster county aforesaid, between the lots No. 5 and 6, and bounded northerly by lot No. 6, now belonging to *John Wendell*, southerly, by lot No. 5, now belonging to the heirs of *James Smith*, deceased, easterly, by *Hudson's* river, and westerly, by lands formerly granted to *John Spratt*." "To have and to hold the aforesaid tract of 500 acres of land and premises, with the hereditaments and appurtenances, unto the said *Alexander Colden* and *Richard Albertson*, as first trustees of the parish of *Newburgh* aforesaid, during their natural lives, and residence on the aforesaid tract of 2,190 acres of land, and to their successors for ever. But to and for the proper use, benefit and behoof of a minister of the Church of *England*, as by law established, to have the care of souls of the inhabitants of the aforesaid tract of 2,190 acres of land, and of a schoolmaster to teach and instruct the children of the aforesaid inhabitants, and their successors for ever, and to no other use whatsoever : And, for the perpetual preservation and confirmation of the aforesaid trust, and the better improvement of the said tract of 500 acres of land, to and for the uses aforesaid ; We do likewise give and grant, that upon the death, disability or absence of the same *Alexander *Colden* and *Richard Albertson*, or either of them, or their successors, it shall and may be lawful to and for all the inhabitants of the aforesaid tract of 2,190 acres of land, being males, and above the age of twenty-one years, to assemble and meet together, at any time or times hereafter, upon some part of the said tract of 500 acres of land, and by majority of voices, to elect and choose other trustee or trustees, in the room and instead of such trustee or trustees, so dying, removing, or otherwise disabled, which trustee or trustees so chosen, hereafter, shall be trustee or trustees of the parish of *Newburgh* aforesaid, to all intents and purposes, as if they had been herein nominated, for the ordering and management of the said 500 acres of land ; And we do hereby further give and grant unto the said *Alexander Colden* and *Richard Albertson*, the present trustees of the parish of *Newburgh*, and their successors, full power and authority, to lease, or grant for any term of years for lives, for ever, 300 acres of the said 500 acres of land, to be laid out in lots of one acre in each lot, reserving the annual rent of 5s. for each acre lot, at the least, to be paid to the said trustees, for the use and benefit of such minister and schoolmaster as aforesaid, and that the remaining 200 acres of the said 500 acres of land (after reserving a sufficient quantity for a church and cemetery, or church-yard) shall for ever hereafter, be and remain for, and as a glebe, for the use of a minister of the Church of *England*, as by law established, to have the care of souls of the inhabitants of the said tract of 2,190 acres of land, and of a schoolmaster to teach and instruct the children of the inhabitants of the said tract, in such proportions, as the said trustees shall think meet, proper and convenient : And that the said trustees, and their successors, for ever hereafter, with the consent of the

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

[* 117]

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

[* 118]

major part of the freeholders of the aforesaid tract of 2,190 acres of land, being resident thereon, shall and may, from time to time, and as often as the same shall be vacant, call, choose, and present a good and *sufficient minister of the Church of *England*, as by law established, to officiate upon the said glebe, and to have the care of souls of the inhabitants of the aforesaid tract of 2,190 acres of land, and to nominate and appoint a good and sufficient schoolmaster, to teach and instruct the children of the said inhabitants; Provided always, that such minister shall be instituted and inducted, in such manner as shall be most suitable and agreeable to our instructions to our governors of our said province of *New-York*, for the time being: And we do hereby further grant unto the said *Alexander Colden* and *Richard Albertson*, and their successors, trustees of the parish of *Newburgh*, free and full liberty and license, to hold and keep a public fair, upon the said tract of 500 acres of land, on the second *Tuesdays* in *April* and *October*, in every year for ever hereafter, where, as well all the inhabitants of the aforesaid tract of 2,190 acres of land, as those of the neighboring settlements and counties, and all other persons whatsoever, may buy and sell any horses, sheep, neat cattle, or any goods, wares and merchandizes, whatever, without paying any toll, or other fees for the same."

The lessors of the plaintiff then proved, that during the time of the said trustees, and a short time after the granting the said charter, 100 acres of the said 500 acres of land were surveyed and set off for the use of a minister of the Church of *England*. A short time afterwards, Mr. *Watkins*, a minister of the Church of *England*, was inducted, agreeably to the charter, and had possession of the 100 acres, as minister, and continued in possession thereof, several years, officiating as minister on the said glebe. Mr. *Sears*, a minister of the Church of *England*, was inducted after Mr. *Watkins*, and as his successor, pursuant to the charter, and took possession of the said glebe, and continued in possession of it, officiating as minister, until the commencement of the war, in 1775. During the time that Mr. *Sears* was in possession of the glebe, a house was erected thereon, for the use of the minister. After the war, in 1785, or 1786, Mr. *Spering*, a minister *of the Episcopal church, was employed to officiate on the glebe, and continued in possession thereof, until 1793, or 1794.

* 119]

It was also proved, that the premises in question, and the possession of the defendant, are parcel of the said 100 acres, called the parsonage lot, or glebe. It was admitted, that two freeholders of the said patent, called the *German* patent, being Episcopalians, were, on the 4th *November*, 1805, and prior to the demises laid in the declaration, elected trustees of the parish of *Newburgh*, pursuant to a public notice, addressed to all the male inhabitants, of the age of twenty-one years, residing on the tract of land, known by the name of the *German*

patent, and belonging to the Protestant Episcopal church. At the time of the election of the said two trustees, there were no persons residing on the said patent, who claimed to be trustees of the said parish. At the election held in pursuance of the said notice, a large majority of the inhabitants of the said patent, who assembled to vote, were excluded from voting, because they were not Episcopalians, and for that reason only. None but Episcopalians, who constituted about one tenth part of the inhabitants, were allowed to vote at the said election. The trustees so elected, entered on the premises, and, afterwards, the present action was commenced.

It was further proved, that in 1803, *Hugh Walsh* and *Levi Dodge*, as trustees of the parish of *Newburgh*, together with about one third part of the freeholders and inhabitants of the said *German* patent, presented a petition to the legislature, requesting certain amendments to the said charter. In consequence of this petition, which was publicly known on the patent, the legislature passed an act, on the 6th of *April*, 1803, entitled, "An act to alter and amend the charter of the glebe land in the *German* patent, in the village of *Newburgh*;" the material part of which is as follows:—

"Whereas a glebe of five hundred acres of land, situate in the town of *Newburgh*, and county of *Orange*, was granted by letters patent, under the great seal of the then *province of *New-York*, on the 26th day of *March*, one thousand seven hundred and fifty-two, to *Alexander Colden* and *Richard Albertson*, and their successors, as trustees of the parish of *Newburgh*, and to the inhabitants then living on the *German* patent, for the support of a minister of the Church of *England*, as then by law established, and a schoolmaster, to have the care of souls, and the instruction of the children of the inhabitants of the *German* patent: And whereas there now is not, nor has there been for several years last past, any such minister in said village: And whereas *Hugh Walsh* and *Levi Dodge*, trustees of said parish, together with the inhabitants of said patent, have by their petition prayed that the said charter be by law altered and amended, so as to meet their interest and convenience; Therefore, *Be it enacted*, &c. that it shall and may be lawful for the inhabitants residing on the said *German* patent, who shall have a right to vote at the annual town-meetings, to meet together in the village of *Newburgh*, on the second *Tuesday* of *May* next, at some proper place, to be appointed by any justice of the peace within the said village, and notified to the inhabitants of said patent, at least one week previous to the said second *Tuesday* of *May*, and then and there to choose, by a plurality of votes, three persons, inhabitants of the said patent, to officiate as trustees of the aforesaid glebe, who shall hold their offices for one year, and until others shall be chosen in their stead; and the said trustees so chosen shall have the like powers to do, and the like duties to

ALBANY,
Feb. 1808

JACKSON
V.
NESTLES.

[* 120]

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

[* 121]

perform, as the trustees of the parish of *Newburgh* have heretofore been possessed of and done; and such justice shall preside at such meeting, and shall declare the persons having the greatest number of votes, as duly chosen trustees; and on every second *Tuesday* in *May*, after the first election of trustees, there shall in like manner be a new election for trustees of the glebe, and the trustees for the time being shall perform the several duties required, from said justice, in respect to notifying *the meeting of the inhabitants of said patent, and presiding at such election.

II. *And be it further enacted*, that the moneys arising from the annual income of the glebe, shall for ever hereafter be appropriated solely to the support of schools on said glebe; that the sum of two hundred dollars of such moneys shall be paid on the first *Tuesday* in *May*, in every year, by the trustees of the glebe, to the trustees of the academy of *Newburgh*, who shall apply the said sum of two hundred dollars, solely to the use of schools taught in said academy; and that the remainder of the money arising from such annual income, shall be paid to the trustees of the other schools which are, or may hereafter be, established on the glebe, in such manner, and in such proportion as the inhabitants aforesaid, from time to time, shall order and direct. Provided always, that if, at any time hereafter, a minister of the Episcopal church shall be inducted on said patent, as nearly in conformity to said charter as may be, then it shall and may be lawful for the said trustees of the glebe to pay annually, for the support of said minister, such proportion of the moneys aforesaid, as shall be reasonable, according to the true intent and meaning of said charter."

A majority of the inhabitants on the said patent elected three trustees in pursuance of the said act, and these trustees, and the defendant, hold the premises in question. The lessors of the plaintiff further offered to prove, that the persons whose names were recited in the said act of 1803, as trustees, were not of the parish of *Newburgh*, at that time, and that neither the said *Hugh Walsh*, or *Levi Dodge*, nor any persons, as trustees, had ever executed any deed of surrender, before or since the passing of the said act; which testimony was overruled by the judge.

[* 122]

It further appeared in evidence, that *Cave Jones*, a regular clergyman, in communion with the Protestant Episcopal church, in the state of *New-York*, on the 4th day *of *November*, 1805, had been called, chosen and inducted as a minister, to officiate on the said glebe; that he was called and chosen by the said persons claiming to be trustees of the parish of *Newburgh*, together with the consent of all the Episcopalians residing on the said patent, and was inducted by the wardens and vestrymen of *St. George's* church, in said parish, (which was admitted to be a religious incorporation, made and created pursuant to the act of the legislature of this state, entitled, "An act to

provide for the incorporation of religious societies," passed the 27th *March*, 1801; and was formed on the 4th of *November*, 1803,) by and with the consent of the persons claiming to be trustees of the parish of *Newburgh*, as rector of said church; and that, as such rector, he afterwards, and before the commencement of this suit, entered into possession of the glebe house, &c.

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES

The counsel for the defendant then moved, that the lessors of the plaintiff should be called to produce further evidence, or be nonsuited. No further evidence being offered, they were directed to be called and nonsuited.

A motion was made, at the last term, to set aside the non-suit, on the following grounds: 1. That, by the charter of 1752, none but Episcopalians were qualified to vote, or were eligible, as trustees of the parish of *Newburgh*. 2. That, by the constitution of the state, none but Episcopalians could vote for, or be elected, as trustees, under the said charter. 3. That the act of the legislature, altering the charter, was unconstitutional; or, if not unconstitutional, it was passed under a misapprehension of the rights and interests of the parties, occasioned by the misrepresentations of those, at whose instance and for whose benefit the act was passed; and that, as there was no surrender of the interest in the said land, the same cannot be affected by the said act. 4. That the Episcopalians residing on the said patent, having never joined in the petition for the said act, or acquiesced in, or acted under it, ought not to be affected by it. 5. That the 100 acres, having been set apart for such minister, as the charter directed, *when such minister was inducted, the use was executed; and that *Cave Jones*, having been duly inducted as such minister, was entitled to recover the possession, as the successor of the last rector of the said parish. 6. That if *Cave Jones*, as such rector, is not entitled to recover the premises, the trustees of the parish of *Newburgh*, at least, are entitled to the possession.

[* 123]

Fisk, for the plaintiff. By the charter, or grant of the 26th of *March*, 1752, none but Episcopalians, or persons belonging to the Church of *England*, were entitled to vote for, or be elected trustees. When all the inhabitants of the tract are mentioned, Episcopalians only are intended. It was clearly so understood by the grantees, who set apart 100 acres of the land for the use of an Episcopal minister, who continued in possession 20 years. By the 36th section of the constitution of this state, all the royal grants and charters prior to the 14th of *October*, 1775, are expressly confirmed; and by the 38th section of the constitution, the free exercise and enjoyment of religious profession and worship is declared, without discrimination or preference. The constitution intended to secure to every religious denomination, their property and rights. By the act of the legislature, of the 6th of *April*, 1784, (7 *Scss*.

ALBANY,
Feb. 1808.

JACKSON
v.
NESTLES

ch. 18. *Greenleaf's* ed. of the *Laws of New-York*, vol. 1. p. 71.) all religious denominations are empowered to appoint trustees, who shall be a body corporate, to take care of the temporalities, and transact the affairs of their respective congregations, or societies. By the act to provide for the incorporation of religious societies, passed the 27th of *March*, 1801, (*Revised Laws of N. Y.* vol. 1. p. 336.) the first section of which relates to Protestant Episcopal churches, the mode of electing church-wardens and vestry-men, and the qualifications of electors, are prescribed. No persons have a right to vote, but such as belong to the same church or congregation.

[* 124]

A large majority of the inhabitants now on the patent are not Episcopalians; and if every male inhabitant, of the age of 21 years, without regard to his religious profession, be allowed to vote, the church may be for ever kept vacant, and the intention of the charter be thereby defeated. *It would be absurd, to allow persons to vote under the charter, who are interested, and disposed to vote in such a way, as to defeat the very object of that charter. If all the inhabitants have a right to vote, and will not vote for *Episcopalians*, then a *mandamus* may be necessary, to compel them to vote for such trustees. In 1803, the inhabitants petitioned the legislature to divest the land, and appropriate it solely to the use of schools. But if the land had once vested in trustees, under the charter, it became vested again in the trustees, elected in 1805; and they could do no more than to set it apart, pursuant to the charter, for the use of an Episcopal minister and a school.

According to the true and legal construction of the charter, then, none but Episcopalians had a right to vote, or if, before the constitution was formed, all the inhabitants of the patent had a right, yet since that time, no persons but such as belong to, or are of the communion of that particular church, have a right to vote, or act in regard to the management of its temporal and religious concerns.

Have the rights of the plaintiff been divested by the act of 1803? It can never affect the rights of the Episcopal inhabitants, as they did not join in the petition. If it be granted, that the legislature have power to interfere and direct the mode in which the charter-officers are to be elected, it does not follow, that they can take away the property of the grantees. In the preamble to the act, *Hugh Walsh* and *Levi Dodge* are stated to be trustees, when, in fact, they were not trustees. It would be strange and unjust, if mere strangers might, by a petition to the legislature, obtain a grant of the property of others. The legislature had no right to make such a grant; and if the act has been passed under a mistake, or through misrepresentation, it cannot operate against those who were strangers to the act, and who did not join in the petition. (*Jackson v. Catlin*, 1 *Johnson*, 253.) The land hav

ing once vested in the grantees, under the charter, it could not be lawfully taken away from them, without their consent.

**J. Radcliff* and *T. A. Emmet*, contra. The original charter was to certain palatines, who were *German Lutherans*. On their removal from the tract, the remaining inhabitants, being of the Church of *England*, or *Episcopalians*, met together, elected trustees, surrendered the original patent, and obtained a new charter to them and their successors. If none but persons of the same religious denomination, with those named in the original grant, had a right to vote, then the *Episcopalians*, in 1752, had no right to elect trustees. There is as much ground to object to the charter of 1752, under which the plaintiff claims, as to the act of 1803, under which the defendant holds. The *Episcopalians*, in 1752, acted in the same manner towards the *Lutherans*, as the *Presbyterians*, in 1803, have acted towards the *Episcopalians*. No evidence was offered under the first and second demises: and the claim of the plaintiff rests on the two last demises. There are two sets of trustees, one of the parish of *Newburgh*, elected pursuant to the charter under which the plaintiff claims; the other created by the act of 1803.

1. It is said, that none but *Episcopalians* have a right to vote for trustees. But the words of the charter are, that all the male inhabitants of the tract, of the age of twenty-one years, are to elect trustees, and that the trustees, with the consent of a majority of the freeholders of the tract, are to call and present a minister, and appoint a schoolmaster. There is nothing in the charter which says, that the persons entitled to vote, shall be *Episcopalians*. Admitting the fact, that, at the time the charter was granted, all the inhabitants were *Episcopalians*, it would not follow, that the right of voting was to be always confined to persons of that religious denomination; since it was not to be presumed, that persons of the same religious sect would for ever continue on the patent, when it was the well known policy of the parent country to encourage *Protestants*, of all denominations, to settle in the colonies. The grant was not solely for a religious object, but for moral and commercial purposes, the support of a *school*, and the upholding of a *fair* or *market*. In the latter objects, every inhabitant was interested, whatever might be his particular enets of religion. According to the intent of the charter, at least in respect to a *school* and *fair*, every inhabitant had a right to vote for trustees. If so, the election in 1805, in which none but *Episcopalians* were allowed to vote, was illegal.

Again, no minister could be called, without the consent of a majority of the freeholders on the patent. The trustees, alone, had no power to appoint a minister. But it is said, that if those who are not *Episcopalians* are allowed to vote for

ALBANY.

Feb. 1808.

JACKSON

V.

NESTLES.

[* 125]



[* 126]

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.



[* 127]

trustees, or to appoint a minister, the intention of the original grant may be defeated. But the rights of *Episcopalians* are not infringed. The trustees would be bound to fulfil the original intent of the charter; the inconvenience that might result from the necessity of compelling the trustees to act, furnishes no legal objection to the construction of the charter, for which we contend. Whenever a minister of the *Episcopal* church is properly inducted, the trustees are bound to appropriate the glebe to his use. This is merely a question of property, not of conscience. No rights of conscience have been violated in this case. Compare it to an *advowson*, or *patronage*. A patron, in *England*, possessing an *advowson*, or right of presentation to a church, may, by common law, be of any religious denomination whatever. A *Jew*, if he purchases an estate, to which an *advowson* is annexed, may present. By the statutes of 3 *James* I. c. 5. and of 1 *William* and *Mary*, sess. 1. c. 26. popish recusants convict, and persons who will not subscribe to the declaration, mentioned in the act against *papists*, are disabled from presenting to a benefice; but persons of every other religious sect, possessing an *advowson*, may present. (*Cruise's Dig. Tit. 21. c. 2. § 22—50.*) There is no ground for the inference, in this case, that because the inhabitants of the patent, at the time the grant was made, were all *Episcopalians*, that, in the lapse of time, other inhabitants, who were not *Episcopalians*, might not vote in the choice of trustees. Such an inference is inconsistent *with the principles of the *English* common law, and against the liberal policy of this country.

2. Again, it is said that none but an *Episcopalian* could be elected a trustee, or rector. But after the adoption of the constitution of this state, no *Episcopalian* could be elected, or inducted under the charter. Before the constitution was adopted, it was essential, that the rector or clergyman should be inducted, by the governor of the state, pursuant to instructions from the king and council, or by the bishop of *London*. As the rights of the king, or bishop of *London*, in regard to the churches in this state, were destroyed by the revolution, it was impossible to carry the charter into effect. The trust, so far as it respected a clergyman of the Church of *England*, ceased, and there remained only the trust as to a *school* and *fair*. By an act of the legislature, passed the 17th of *April*, 1784, (*Greenleaf's* ed. of the *Laws* of *N. Y.* v. 1. p. 95.) the charter of *Trinity* church, as it respected induction, was repealed. This act shows clearly the opinion of the legislature, that the charter, so far as it related to the induction of a clergyman of the Church of *England*, could not, consistently with the constitution of the state, be carried into effect. The regulations of this act, however, were confined to the southern district. The constitution was left to have its full effect on all the charters in the other parts of the state, which were not,

100

it is probable, thought of sufficient importance, to induce an application to the legislature to revive the uses and trusts, as it respected the *Episcopal* church. It is to be observed, also, that the legislature, by the act of 1784, in relation to *Trinity* church, recognized and confirmed the previous acts of the council, for the temporary government of the southern district, who, upon the petition of sundry persons, and to prevent dissensions, declared the places of the church-wardens and vestry-men vacant, and vested all the estate, real and personal, of the corporation, in certain persons named in the act.

Induction, in *England*, is an act done, *ex mandato* the arch-deacon. (*Cruise's Dig. Tit. 21. c. 2. § 13.*) In this state, before the constitution, *it was an act done according to a *mandate* from the king to the governor. Who became the heirs and successors of the crown, in relation to the right of induction? As the governor had a right to induct by command of the king only, surely, this right could not have vested in the church-wardens and vestry-men at *Newburgh*.

3. It is said, that the act of 1803 was unconstitutional, or passed under a mistake, as to the rights of the plaintiffs. We contend that the act was constitutional, and as it granted the land to the trustees, under whom the defendant claims, it is conclusive in this cause. It has been already shown, that by the revolution, and constitution of this state, the trusts and uses of the charter, as it respected a minister of the Church of *England*, became extinct. The only trust or use remaining, was in relation to a *school* and a *fair*, or *market*; and in regard to these objects, all the inhabitants, without regard to religious distinctions, were interested, and had a right to vote in the choice of trustees, and to petition the legislature. No rights have been infringed. The act makes no new law; it provides, that if, at any time thereafter, a minister of the *Episcopal* church should be inducted, as near as may be, according to the charter, that the trustees of the glebe should pay to him, annually, a reasonable proportion of the moneys arising from the lands, according to the true intent of the charter. The act was, therefore, wise and beneficial. It gave effect to the existing trust or use, as to a *school*, under the charter, and left the other use, as it regarded a minister, untouched. There was no evidence of any surrender of the charter; and the judge, at the trial, declined giving any opinion as to the effect of any misrepresentation to the legislature. The legislature had a right to vest the estate without a surrender. An estate may be made to cease by statute, (*Bac. Ab. Statute, E. 6 Rep. 40. Mildmay's case, Cro. Eliz. 379.*) and to pass and vest, in a manner different from what it could by the common law. (*1 Lev. 75. T. Raym. 355. 2 Inst. 4th par. 36.*) The power of the legislature is unlimited, except by the constitution. It may take the property of A. and grant it to B., though it is bound, undoubtedly, in justice and honor, to make full

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES

[* 128]

ALBANY,
Feb. 1848.

JACKSON
V.
NESTLES.

compensation *to A. ; but whether this be done or not, the grant to B. is, nevertheless, valid. In relation to the rights of property, the legislature is supreme and uncontrollable. Without wishing to extend the powers of the legislature, we must say, that when the legislature have enacted what is not forbidden by the constitution, courts of justice must bend and bow before the law. No court has power to pronounce such an act void. The doctrine, that a law against natural justice is no law, may be true in theory, but in experience and practice it is otherwise. But even in such case, the injustice must be gross and palpable. What shall we say of the bills of attainder, passed during the late war, by which the estates of persons were forfeited and taken away, without a trial, when the parties were absent and unheard? It is true, that since the constitution of the *United States*, no such bills can again be passed ; but this court has never questioned the validity of those acts. So the charter of the corporation of the city of *New-York* has been altered by an act of the legislature. Again, it is a maxim of law and of justice, that no man ought to be a judge in his own cause ; yet, by an act of the legislature, the Mayor's Court of this city, consisting of the mayor, recorder and aldermen, are empowered to take cognizance of causes, in which the corporation are parties, in relation to private property, and the regulation of streets. Yet the validity of this act has never been called in question. It has been said, that when the act of 1803 was passed, there were no trustees ; if so, then the rights of no person have been infringed.

4. *Cave Jones*, the minister elected in 1805, cannot maintain this action. He had not the legal estate, nor was he the *cestui que use*. The use was executed in the trustees, not in *Jones*. It could not be executed in *Jones*, for a use cannot be executed, unless there be a person seised to the use of another. (1 *Cruise's Dig.* 422. *Tit.* 9. c. 3. § 7.) Now, the trustees, being a corporation, cannot be seised to a use. (*Ibid*, 423. 1 *Co.* 122. a. 126. a. *Dyer*, 283. a.) It was, in fact, a trust at common law, or use executed in the trustees, *by the statute. (1 *Cruise's Dig.* 462, 463.) The trustees had power to grant leases, and no other person could exercise that power. A *parson*, in *England*, is a corporation sole, and is seised of the freehold. Here the rector is not a corporation sole, nor is he seised of the freehold. The trustees had no right to locate the two hundred acres, for the exclusive benefit of a clergyman ; for the charter gives it for the joint object of a minister and a *school*. It is clear, therefore, that *Cave Jones* had no legal estate ; he was in possession, neither under the old charter, nor the new incorporation. He was neither inducted according to the charter, nor according to the act of the legislature, relative to religious incorporations. Again, the new religious corporation can claim nothing under the old corporation. There is no

[* 130]

privity between them, no legal succession or inheritance, by which the rights or property of the one can be transmitted to the other. The trustees elected under the new incorporation could not be the lessors of the plaintiff, for the act of 1803 had vested the estate in others, in order to carry into effect the remaining trusts of the charter.

ALBANY,
Feb. 1808.

JACKSON
v.
NESTLES

Benson, in reply. According to the charter, the trustees had the power, and it was their duty, to assign 200 acres of the land, for the use of a minister. They, in fact, assigned 100 acres, as a glebe, and the assignment of that quantity for a glebe, is to be presumed to have continued as a practice and usage, under the charter, from 1752 to 1775. *Walsh* and *Dodge*, who called themselves trustees, in 1803, ground their petition to the legislature, on the fact that there was no minister. Now, if they were trustees, it was their duty to call a minister. But, in truth, they were not legal trustees under the charter. Under the original grant to the palatines, all the corporators must have been *Lutherans*; so, under the new charter, all the corporators must have been *Episcopalians*. There is no analogy between an *advowson*, according to the *English* law, and this charter. An *advowson* is property which may be sold, or aliened in fee, for life or for years, and will descend, *like any other estate. The *patron* may exercise the right of presentation, or not, at his pleasure. In the present case, the trustees could not sell, or transfer the rights given them, under this charter. They were bound to fulfil their trust, and might be compelled to execute it, in case of neglect or refusal. It is not to be presumed, that it was intended, that the grant should confer a power, by which its object might be wholly defeated: on the contrary, it must be intended, that the right of election was to be confined to such as were *Episcopalians*.

[* 131]

The act of 1803 provides, that as soon as a minister shall be inducted, as near as may be, according to the charter, the trustees shall pay a part of the money, for the use of the minister, according to the intent of the charter. The word *inducted* is used in a popular sense; that is, where a person is duly called, and elected a minister, by the trustees, or church-wardens and vestry. The term *induction*, in the sense in which it is used in the *English* law, is not applicable to this country; though there is some formal and symbolical act of giving possession of the church, by the church-wardens and vestry. The governor of the state, certainly, never went, in person, to induct clergymen, under a mandate from the king, as has been supposed. The charter of 1752 was a good grant: it did not cease to exist because no trustees were elected. The act of 1803 recognizes the existence of the charter, and authorizes an induction, as near as may be, according to the charter; *Cave Jones* was, in fact, inducted, as near as might be, according to the charter. If all the formalities prescribed in old charters,

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

[* 132]

were required to be rigidly and strictly observed, many of them might be defeated.

As to the power of the legislature to pass the act in question, that is a point for the court to determine, or not, in their discretion. Yet, would it not be proper to consider all private acts of the legislature, in relation to property, as grants, and to be avoided, when obtained by fraud or false suggestions? In *England*, so many precautions have *been adopted, in passing private acts, that it is scarcely possible, that the parliament should be imposed on. The consent of all parties in being, and capable of consenting, however remote their interest may be, in the property to be affected, is always required. The bill is either referred to two judges, or to a committee, before whom all the recitals and allegations are as fully examined and proved, as they would be on a trial in ejectment; and after the bill is reported and committed in the house, new evidence is again produced; and the same course is observed in both houses; and a general saving clause is usually added, as to the rights of all persons, except those consenting, or named in the act. And it has been held, by the *English* courts, that a private act of parliament does not bind strangers, and may be relieved against, if obtained upon fraudulent suggestions. (4 *Cruise's Dig. Tit. 33. § 23. 31. 49. 53. 2 Black. Comm. 345. Hargrave's jur. arg. v. 2. p. 392.*) It must be competent, then, to this court, to decide, in relation to all private acts, whether they have been obtained by fraud and imposition.

The act of the legislature, in regard to the charter of *Trinity* church, arose out of the times, and can be excused only by the necessity, and peculiar circumstances, existing at the close of the revolution. It furnished no authority, or precedent for subsequent legislatures, in a settled and established order of things.

The trustees, having set apart 100 acres of land, as a glebe, for the use of a minister, as soon as a minister was duly inducted, he became seised of the glebe, and was capable of maintaining an action for its possession. It is sufficient that he has been elected, and inducted, as near as may be, pursuant to the charter. Had not the legislature declared, that such an election, or induction, should be valid, a court of chancery would not have suffered the rights, under this charter, to be lost, or defeated, not by any act or neglect of the parties, but by the events of a revolution; but would have interposed and directed, that they should be exercised, *as near as may be*, according to the charter.

[* 133]

*VAN NESS, J. On the argument, several nice and delicate questions were raised for our decision. The property in dispute is understood to be valuable, and being appropriated for religious and other beneficial public purposes, it is desirable that a compromise should be effected between the parties, upon

principles of mutual concession, whereby the ends of the original grant may, in some way, be attained. My opinion will leave the door to compromise open, and if the parties shall not avail themselves of this opportunity to adjust the controversy, by amicable arrangement among themselves, they must bide the consequences of such decisions as the court shall, in the course of future litigation, feel itself bound to pronounce.

The lessors of the plaintiff found their right to a recovery, upon the legality and validity of the election of trustees, in *November, 1805*, conducted, as they contend, in conformity to the original charter. They deny the right of the legislature to make the law of 1803; but even conceding that the legislature had the right, they allege that the law was obtained by fraud and misrepresentation, and ought, therefore, to be avoided.

The defendant denies the legality of the election of 1805, inasmuch as Episcopalians, exclusively, were permitted to vote thereat. But admitting that the charter gave to Episcopalians only the right to vote, he says, that the act of 1803 has altered and modified the charter, and that he derives his possession from the trustees chosen pursuant to that act.

The trustees of the parish of *Newburgh* are a body corporate, and it is taken for granted, on all hands, that the title to the land in controversy is vested in that corporation, or those claiming under it. And in my view of the subject, the only question presented by the case is, Who are the members composing this corporation?

To determine that question, the counsel on both sides have proceeded on the idea, that a decision as to the validity of one or both of the elections of trustees, is necessarily involved. I think differently. The question *in this action is not, who are the trustees *de jure*, but who are the trustees *de facto*. As long as the conflicting claims of these different sets of trustees, both elected under color of right, to the exercise of the corporate rights, remain undetermined, so long the possessions held under either ought not to be disturbed. I am satisfied, that in the present suit, these claims cannot be tried. If an inquiry into the qualifications of the persons who were permitted to vote at the election of 1805 can be made, the same inquiry is equally proper, as to the qualification of those who voted at the election of 1803. In fact, the regularity of every part of the elections would be open to investigation. This would be, not only an unprecedented mode of proceeding, but contrary, in my opinion, to known and well settled rules.

The defendant is in possession, *under the trustees elected pursuant to the act of 1803*. I intend, that he is in possession under a lease, sealed with the corporate seal; and those trustees, as it respects this portion, at least, of the lands belonging to the corporation, must be regarded as the trustees *de facto*. They were elected *before* the other set of trustees, under an existing law of the legislature, and until they are

ALBANY,
Feb. 1808.

JACKSON
V.
NESTLES.

[* 134]

ALBANY,
Feb. 1808.

JACKSON
v.
NESTLES.

ousted, the court is bound to protect the possession of their tenant.

The only way in which the legality and regularity of these elections can be settled, is by *information*, in the nature of *quo warranto*, under our statute. This is the appropriate remedy, in all cases of contested corporation elections; and either of the present parties may resort to it, to have their rights fully investigated, and finally determined.

Until it shall have been determined, by this mode of proceeding, who are the rightful and legitimate representatives of the corporation, I shall be unwilling to disturb the possessions of either of the parties. My opinion, accordingly, is, that a new trial ought to be denied.

[* 135]

*SPENCER, J. The plaintiff having been nonsuited at the trial, it becomes a question, whether a title has been deduced under either of the demises. The first demise is from the religious incorporation, formed under the statute, on the 4th November, 1805, and their title is supposed to have commenced, at the time of the incorporation, and to extend to such real estate, as the original trustees, *Colden* and *Albertson*, held under the grant of the 26th March, 1752. Upon the principles of the common law, this religious incorporation could take such property only, as had been granted to it, by its corporate style, and not being *in esse*, when the first grant was made, it could not acquire any interest by relation. If, therefore, it became invested with any property in the lands granted to *Colden* and *Albertson*, it can only be under the provisions of the general statute. To acquire a title by that statute, it is necessary, that the grant should have been to the corporation, to the congregation, or society, or to *Colden* and *Albertson*, for their use. By a reference to the charter, it will be seen, that although *Colden* and *Albertson* were trustees, they were not trustees exclusively, for the benefit of that society, but for the benefit of a minister of the church of *England*, and a schoolmaster, in the proportion which the trustees shall think meet and convenient; so that the trustees had a discretionary control over the fund, the profits of which they could distribute as they saw proper. It appears to me, that under the charter, therefore, it cannot be contended, that the corporation acquired any legal interest in the land itself, they not being *cestui que trusts*, for the entirety, nor for any definite proportion of it.

The second and third demises involve the same question, except so far as respects *Cave Jones*, and that is, whether the election of the 4th November, 1805, was a valid election, and conferred on the lessors the legal estate to the lands in controversy. The case states, that a large majority of the inhabitants of the *German* patent, who assembled to vote, were not Episcopalians, and, for *this reason only, their votes were

[* 136]

refused, and that none but Episcopalians, who did not compose one tenth part of the inhabitants, were allowed to vote at that election. The right of election is expressly given, by the charter, to all the male inhabitants of the *German* patent who are above the age of twenty-one years. The trustees, when elected, have the disposal of the revenues of the glebe, and are to distribute them, as they think meet, between the minister and schoolmaster; the minister is required, by the charter, to be of the Church of *England*, and has the care of souls of all the inhabitants on the patent, whilst the schoolmaster may be of any religious denomination, and it is his duty to instruct the children of all the inhabitants.

From this statement, it would seem to me, most conclusively, that no court of law, called upon to pronounce, not to make, the law, can hesitate in saying that all the inhabitants of the *German* patent have an important right, secured to them by the charter, of electing trustees, to make not only the selection of a schoolmaster, but to decide on his salary. Of this right, they ought not to be deprived, from a supposed inconsistency, that persons of various religions, may, under the words of the charter, interfere in the choice of an Episcopalian clergyman, or may be averse to the employment of one of that order.

It must have been foreseen, when the charter was granted, that there would be persons of different modes of religious worship on the *German* patent; yet, still, they were to be admitted to a participation in the elections. It cannot be requisite to advert to other parts of the charter, to enforce the propriety of the opinion I have formed; if it was necessary, my opinion would receive additional force, from that part of the charter which enables the trustees to hold fairs, in which, as well as in the choice of a schoolmaster, all the inhabitants have a vested interest by the charter, and consequently, cannot, and ought not to be deprived of the right of choosing their trustees, on the propriety and *fidelity of whose conduct, their rights, in a great measure, depend.

With respect to the demise from *Cave Jones*, there is no pretence to say, that he acquired any legal title to any portion of the lands, under his induction and settlement. The only claim he had, was to such part of the revenues of the glebe as the trustees thought proper to give him.

The plaintiff having failed to show any title, the defendant cannot be disturbed in his possession. This view of the case renders it unnecessary to consider the objections raised to the act of the 6th *April*, 1803. My attention has not been particularly directed to the consideration, whether the legality of the election of trustees can be tried in this collateral way, inasmuch as both parties have considered the validity of the election of *November*, 1805, fairly before the court, without any objection to the manner in which it has been presented.

ALBANY,
Feb. 1806.

JACKSON
V.
NESTLES.

[* 137 .

ALBANY.
Feb. 1808.

M'KERRAS
v.
GARDNER.

In my opinion, the nonsuit ought to be confirmed; and that consequently, the plaintiff must take nothing by his motion.

KENT, Ch. J., and THOMPSON, J., having been absent, from indisposition, on the argument of the cause, gave no opinion.

Rule refused.

M'KERRAS *against* GARDNER.

Where the defendant had agreed to remove his goods from a store in *May*, 1803, but neglected to do so; in consequence of which the plaintiff was, in 1806, obliged to pay damages to the person to

[* 138]

whom he had sold the store; it was held, that the cause of action accrued when the defendant neglected to remove the goods, in 1803, and not when the plaintiff had to pay damages in 1806, and that, consequently, the plaintiff, having been before sued by the defendant, in 1806, before a justice, on a note, was bound to set off this demand, for damages on the agreement.

ON *certiorari*. The plaintiff below declared against the defendant, for damages, sustained in *July*, 1806, in consequence of the defendant's not removing his goods from a store, occupied by him under the plaintiff, and which removal was, by a contract between the parties, to have been made in *May*, 1803. The defendant pleaded a suit, and a recovery by him against the plaintiff, before another justice, on a promissory note, in *April*, 1806, in which suit the plaintiff's demand ought to have been set off.

*On the trial, the plaintiff below proved, that he had sold the store occupied by the defendant, to one *Hammond*, who was to have had possession, on the 1st of *April*, 1803, and that the defendant would not give up the possession till the 27th day of *June* following; that after the month of *April*, 1806, *Hammond* demanded damages of the plaintiff below, for not delivering up the store, upon which he and *Hammond* settled, the plaintiff paying him twelve dollars and fifty cents.

H. Bleecker, for the plaintiff in error. The demand of the plaintiff below ought to have been set off in the suit brought against him by the defendant on the note. The cause of action arose when the contract to remove the goods, or deliver up the store was violated, which was in *May*, 1803, and did not accrue upon the settlement of the damages between the plaintiff below and *Hammond*, after *April*, 1806.

Henry, contra. The plaintiff below had not suffered any loss, till the damages were demanded by *Hammond*, and paid to him. The cause of action may, therefore, be said to have accrued at the time, and consequently could not have been set off in the suit on the note.

Per Curiam. The plaintiff's demand in the court below ought to have been set off in the suit on the note. The judgment must be reversed.

Judgment reversed.

ALBANY,
Feb. 1808.

NICHOLSON
v.
LOTHROP.

JACKSON, *ex dem.* LAWE, *against* VIRGIL.

GOLD, for the defendant, moved for an attachment against the lessor of the plaintiff, for the non-payment of the costs on a judgment, as in case of nonsuit. He read the affidavit of A. B., that he served on the lessor of the plaintiff, a copy of the rule for judgment, and of the consent rule, together with the taxed bill of costs; and that he, at the same time, showed the *ca. sa.* against the plaintiff, *and being thereto lawfully authorized, did demand of the lessor of the plaintiff, the costs according to the taxed bill, but which he had not paid.

In order to bring a party into contempt, for the non-payment of costs the person serving the taxed bill, &c. must show to the party, his authority to receive the costs.

[* 139]

Per Curiam. The affidavit of service is not sufficient. It ought to appear, that the person who demanded the costs of the lessor of the plaintiff showed his authority to receive them, or how he was authorized by the defendant. Greater strictness is required to bring a party into contempt, than in ordinary cases.

Rule refused.

NICHOLSON *against* LOTHROP.

GOLD, in behalf of the defendant, moved to change the *venue*, in this cause, from the county of *Albany*, to the county of *Oneida*. The action was for a *libel*, stated to have been published by the defendant, in a paper printed at *Utica*, in the county of *Oneida*, where the defendant resides. It was stated, that the cause of action, if any, arose in *Oneida* county, and that the defendant had a number of witnesses in that county, and also in the county of *Herkimer*.

In an action for a *libel*, if the defendant swears that the *libel* was published in a different county from that in which the *venue* is laid, and that he has a number of material witnesses residing in such county, the court will direct the *venue* to be changed. (a)

Per Curiam. As the defendant states, that he has material witnesses in the counties of *Oneida* and *Herkimer*, without mentioning how many of them reside in each, and as the plaintiff resides in the latter county, we grant the motion, with liberty to the plaintiff to elect, within twenty days, to lay his *venue* either in *Oneida* or *Herkimer*.

(a) See *Paine v Parker*, 13 Johns 323.

Rule granted.

ALBANY,
Feb. 1808.

JACKSON
v.
BROWNEL.

STARR *against* SCHUYLER.

Where a judgment was entered up, by warrant of attorney, on a bond alleged to be given for a usurious con-

[* 140]
sideration, a *feigned issue* was awarded to try the fact of usury, and execution was stayed until after the trial

FOOT, for the defendant, moved to set aside the execution, which had been issued in this cause, on a judgment, entered by warrant of attorney on a bond, which the defendant, in his affidavit, alleged to have been given for a *usurious* consideration.

**Henry*, contra, read the affidavit of the plaintiff, explaining the transactions between the parties, but which did not expressly deny the allegation of usury.

Per Curiam. Take your rule, that all the proceedings under the judgment be stayed, until the further order of the court; and that a *feigned issue* be awarded, and brought to trial at the next circuit to be held in the county of *Albany* or *Rensselaer*, at the election of the plaintiff, to try the allegation of usury, as to the bond on which the judgment has been entered; and that the feigned issue be prepared by the counsel for the defendant, and submitted to the plaintiff within twenty days; and if the counsel for both parties cannot agree in settling the issue, either party may apply to a judge, at his chambers, for the purpose of having the same settled under his direction.

JACKSON, *ex dem.* COLDEN and others, *against*
BROWNEL.

After argument of a case, and before judgment, at the instance of the defendant, the case was allowed to be amended, on paying the costs of argument, and giving to the plaintiff the election afterwards to be nonsuited, or to have a new trial.

THIS cause was argued at the last *August* term, on a case which had been settled by the judge, before whom the cause had been tried; but no decision had yet been given by the court.

Russel, for the defendant, now moved for leave to amend the case, on an affidavit of a mistake, in stating some of the testimony given at the trial.

Van Vechten, contra.

Per Curiam. Take your rule; but the defendant must pay the costs of the argument in *August* term, if the plaintiff consents to a nonsuit, after the amendment, or the plaintiff may elect, within twenty days, to have a new trial, with costs, to abide the event of the suit.

Rule granted.

CURRIE and WHITNEY *against* HENRY.

RUSSEL, for the plaintiff, moved for leave to withdraw the demurrers to the second and fourth pleas, and to reply to the same pleas; judgment having been given at *the last term, for the defendant, on the demurrers. (2 *Johnson*, 423.)

Foot, contra.

Per Curiam. It is too late, after the term in which judgment has been given, to ask for leave to withdraw a demurrer, or to amend. A similar motion was refused, at the last term, in the case of *Bird and others v. Caritat*.

Rule refused.

ALBANY,
Feb. 1808.

DUMOND

v.

CARPENTER.

After judgment
[* 141]
on demurrer, it
is too late at
the next term,
to move for
leave to with-
draw the de-
murrer.

DUMOND *against* CARPENTER.

ON ERROR from the Court of Common Pleas, of the county of *Ulster*. *L. Elmendorf*, for the plaintiff, in error, moved that a certified copy of the *capias ad satisfaciendum*, issued in the court below, and copies of two rules entered there, should be annexed to the return to the writ of error, in this case, which had been directed to that court.

Sudam, contra.

Per Curiam. This application comes too late, after an assignment of errors. The plaintiff, at the time he assigned errors, should have alleged diminution, and prayed a *certiorari*. But if the *ca. sa.* were before this court, it would not avail the plaintiff. If the judgment of the court below be correct and legal, no error will lie for any irregularity, as to the execution. Each court has a control over its own process, and if there be any irregularity, the proper remedy is by application to the court below.

After an assign-
ment of errors,
it is too late to
move, that the
return to a writ
of error be
amended. If
the judgment
of the court be-
low be correct
and legal, no
error lies for
any irregular-
ity, as to the
execution.
Each court has
a control over
its own process.

Rule refused.

ALBANY,
Feb. 1808.

KING
v.
SHAW.

PHILIPS and PHILIPS *against* BLAGGE.

An inquest, taken by de-
[* 142]
fault, was set aside on an affidavit of the attorney of the defendant, that, from the representations made to him by the defendant, and the papers he had examined, he verily believed that the defendant had a legal defence. (a)
Counter affidavits are not allowed to be read in opposition to such a motion.

HENRY moved to set aside the inquest taken in this cause at the last sittings, in *New-York*. The affidavit of the attorney of the defendant stated that the defendant *was absent beyond sea, and had represented to him, that he had a good and substantial defence on the merits; and, from his representations, and the papers produced, he verily believed there was a legal defence. The inquest had been taken out of its order, on the calendar of causes.

Sedgwick, contra, offered counter affidavits; but *the court* said, that it was settled, that no counter affidavits could be read in such a case. The plaintiff had no right to go to trial, when the defendant was called, and he took the inquest by default, at his peril; and the court will always set aside a verdict, so taken, when they are satisfied that the defendant has a good defence.

Rule granted.

(a) See *Geib v. Icard*, 11 Johns. 82. *Roosevelt v. Dale*, 2 Cow. Rep. 581.

KING *against* SHAW.

A warrant of attorney was given in vacation, to enter up judgment, in vacation, or term, on a bond given at the same time, and payable immediately; and judgment was entered up as of the preceding term, but the court refused, on motion, to set aside the judgment. On affidavit, that the bond and warrant of attorney, on which judgment was entered up, were *forged*, the court directed a feigned
[* 143]
issue to try the fact of forgery.

N. WILLIAMS and *T. A. Emmet*, for the defendant, moved to set aside the judgment and execution in this cause; 1. Because the judgment was entered up on a bond and warrant of attorney, which were *forgeries*. 2. For irregularity.

The bond was dated the 13th of *October*, 1787, and payable on demand. The warrant of attorney was dated at the same time, and authorized the attorney to enter up judgment on the bond, "*in term or vacation*;" and the judgment was entered up, in the vacation, as of the preceding term of *August*.

As to the irregularity, they cited *Strange*, 1121. 8 *Term*, 153. 1 *Mod.* 1. 7 *Mod.* 5. *Siderfin*, 222. 1 *Term*, 80. 1 *Ventris*, 113. 1 *Crompton*, 381. 1 *Tidd's K. B. Prac.* 497.

Sedgwick and *Henry*, contra.

Per Curiam. An authority to enter up judgment in vacation, on a bond, payable immediately, will include the vacation in which the bond was given; for the parties must be supposed to mean the present, as well as any future vacation. There was, then, no breach of good faith, *in entering up the judgment, in the *August* vacation; and the relation back to the term of
112

August, is a fiction, which can prejudice neither the parties nor purchasers, since the judgment is a lien only from the day on which it is docketed. To enter up judgment on a bond, of a term before it was executed or due, is, however, error on the face of the record; but we do not think it proper to interfere in this way. The defendant must be left to his remedy by writ of error, and the plaintiff to protect himself by a release of errors, if he can procure it. As to the charge of *forgery*, the affidavits are contradictory, and this court cannot weigh the credit of those who have made them. It is indispensable, therefore, that an issue be awarded to ascertain the truth; as to the genuineness of the bond and warrant of attorney; and this issue must be prepared and brought to trial at the next circuit, to be held in the county of *Cayuga*.

ALBANY.
Feb. 1863.

CLINTON
v.
MITCHELL.

Rule refused.

CLINTON *against* ELMENDORF.

VAN VECHTEN, for the defendant, moved to set aside the report of the referees, in this cause, on the *merits*.

Thursday, Feb.
11th.

Hawkins, contra, objected that this being a day to hear non-enumerated motions, the present motion was not in order.

A motion to set aside a report of referees on the *merits* is an enumerated motion. Rules of S. C. January term, 1799.

Per Curiam. This being a motion to set aside the report on the *merits*, it must be considered as an enumerated motion; it is otherwise, when founded on *irregularity*.

*CLINTON *against* MITCHELL.

[* 144]

THIS was an action for a libel. *Rudd*, in behalf of the defendant, moved for leave to strike out the notice annexed to the plea of *not guilty*.

In an action for a libel, the defendant pleaded not guilty, and gave notice of certain facts, to be proved on the trial; and afterwards moved for leave to strike out the notice, but the court refused to grant the motion, unless he

J. Tallmadge, contra, observed, that he had no objection to the granting of the motion, if the defendant would make affidavit of the *falsity* of the facts stated in the *notice*, which he said was far more libellous than the publication complained of in the plaintiff's declaration; otherwise, he contended, the

would make affidavit of the falsehood of the matters stated in the notice. (a)

(a) *Lent v. Butler*, 3 Cow. Rep. 370.

ALBANY,
Feb. 1808.

CORP
v.
VERMILYE.

whole ought to appear on the record, that a jury might pass upon it.

Per Curiam. We are not disposed to countenance this mode of pleading, unless it be done in good faith. If done wantonly, and for the purpose of experiment, it ought not to be suffered. Unless the defendant will state upon the record, or make affidavit, that the charges contained in the notice are groundless, the motion must be denied.

Rule refused.

M'INTYRE *against* ROWAN.

A *ca. sa.* on which the defendant had been taken, was allowed to be amended, by adding the *testatum* clause.

A JUDGMENT was entered up in this cause on default, and a *ca. sa.* issued to the sheriff of *Washington* county, on which the defendant was taken, and remained in prison. The *venue* was laid in the county of *Albany*, and the attorney, by mistake, omitted to insert the *testatum* clause in the *ca. sa.* *Crary*, for the plaintiff, now moved to amend the *capias ad satisfaciendum*, by inserting the *testatum* clause.

Per Curiam. Amendments of this nature are always in the discretion of the court. Take your rule.

Rule granted.

[* 145]

*CORP *against* VERMILYE.

The affidavit on which a motion is made to remove the cause into the Circuit Court of the *United States*, must state expressly, that one of the parties is a citizen of another state.

SPECIAL bail having been filed in this cause, the defendant presented his petition, stating that he was "a resident of the state of *New-Jersey*, and that he was desirous of removing the cause into the next Circuit Court of the *United States*, to be held in and for the district of *New-York*, in the second circuit," and offered sufficient security for entering in the said court, on the first day of its next session, true copies of the proceedings, and for his appearance in that court, on that day, and entering special bail in that court.

Johnson, for the defendant, moved, that the security offered be accepted, that the bail given in this court be discharged and that all further proceedings be stayed.

Henry, contra, objected, that the petition and affidavit of the defendant stated merely that he was a resident of *New-Jersey*, not that he was a *citizen* of that state.

ALBANY,
Feb. 1808.

DUBOIS
v.
ROOSA.

Per Curiam. The defendant ought to have shown, that he was a *citizen* of *New-Jersey*.

Motion denied. (a)

(a) See 3 *Dallas*, 382. 2 *Cranch*, 1. 126.

DUBOIS *against* ROOSA.

L. ELMENDORF, for the plaintiff, moved for a retaxation of the costs, and to set aside the judgments of nonsuit entered in four other causes between the same parties, on the ground of irregularity. It appeared that five actions of trespass had been brought by the plaintiff against the defendant, which were noticed for trial at the last *Ulster* circuit. One of them was brought on to trial, and the plaintiff was nonsuited. * The defendant entered up judgment in all the causes, and proceeded to have the costs taxed in each.

Rules by consent or agreement between parties, or their attorneys, are not binding, unless entered in the book of common rules, or reduced to writing, and signed by them, or some person authorized for that purpose.

[* 146]

**Hawkins*, contra, read affidavits, stating that a rule had been entered in the minutes of the clerk of the circuit, by consent of the plaintiff's counsel, that four of the causes should abide the event of the cause first brought on to trial.

Per Curiam. No rules by consent, except such as are entered in the book of common rules, are binding, unless signed by the attorneys. According to the spirit of former decisions of the court, no agreements between parties or their attorneys are binding, unless in writing, and signed by them, or by some person authorized for that purpose, or entered in the book of common rules. The costs prior to the circuit, as to the cause tried, may be retaxed, but the costs, in the other four causes, must abide the event.

ALBANY,
Feb. 1808.

DODGE
v.
CODDINGTON.

DODGE *against* CODDINGTON.

The court may order a justice to return the evidence in a cause before him, and if it does not appear sufficient to support the action, the judgment will be reversed. In an action on a note to pay money, when collected, &c. the plaintiffs must allege, and prove that the money was collected, in order to recover on the promise.

IN ERROR on *certiorari*. The defendant in error declared against the plaintiff in error, in the court below, on a certain writing or due bill, as follows :—

“Due *J. Coddington*, 17 dollars and 38 cents, for sheriff’s fees, which I promise to pay, when collected from the estate of the late *John and Cornelius Wynkoop*, deceased, &c.

“*Newburgh*, 2d September, 1799.

(Signed) “LEVI DODGE.”

The defendant below pleaded *non assumpsit*, and the statutes of limitation. The plaintiff proved the hand-writing of the defendant, but produced no evidence that the defendant had collected the money. The justice gave judgment for the plaintiff.

H. Bleecker, for the plaintiff in error, contended, that the plaintiff ought to have averred, in his declaration, that the defendant had collected the money, and to have proved that averment.

[* 147]

**L. Elmendorf*, contra, objected, that the court could not inquire as to the facts, nor reverse the judgment, unless for errors in law ; and not because it was against evidence.

Per Curiam. The act of the legislature authorizes the court, to require the justice to return the evidence ; and if, on the return of the evidence, it does not appear sufficient to support the action, the court will reverse the judgment ; and we have often so decided. In the present case, there was a condition precedent, and the proof does not support the declaration. The judgment below must be reversed.

Judgment reversed.

ALBANY,
Feb. 1808.GALE *against* CHASE.GALE
v.
CHASE.

IN ERROR, on *certiorari*. The plaintiff in error, having been taken by a warrant, issued against him at the suit of the defendant in error; on the 2d of *June*, 1807, he endorsed, on the back of the warrant, a written request to the justice, to enter up judgment against him, for whatever demand the plaintiff should have against him, to the satisfaction of the justice. On the 8th day of *June*, he called on the justice, and informed him, that he had given such a writing to the constable who served the warrant; but that since he gave the confession to the officer, he had discovered that the plaintiff claimed a greater sum than was due, and desired the justice not to enter judgment, until he could see the plaintiff and settle with him, which, if he could not do, he must have a trial, for he did not suppose that he owed the plaintiff more than 10 dollars. On the same day, the plaintiff appeared, and stated his demand to be 25 dollars, for a barrel of potash. Nothing was done by the justice until the 10th *day of *July*, when the plaintiff below called on the justice, and informed him, that the defendant had not settled the demand, and requested judgment on the confession given by the defendant. The justice, thereupon, entered up judgment, *nunc pro tunc*, on the confession, for 25 dollars, and the costs.

H. Bleecker, for the plaintiff in error.

Mumford, contra.

Per Curiam. The authority to the justice to enter up the judgment, must be considered as a parol authority, and revocable by the defendant. What he stated to the justice, amounted to a revocation, and a trial ought to have been had, to ascertain the amount due to the plaintiff. The judgment below must be reversed.

Judgment reversed.

Where the defendant endorsed on a warrant, a written request to enter up judgment against him, for whatever demand the plaintiff might have against him, to the satisfaction of the justice, and the next day desired the justice not to enter the judgment, as he had since discovered, that the plaintiff demanded more than was due

[* 148]
to him; it was held, that such a consent or request was revocable, and that the justice should have had a trial, to ascertain the amount due, and not have entered up judgment on the demand of the plaintiff.

ALBANY,
Feb. 1808.

HUNT
V.
ONDERDONK
and others.

CLARK *against* HOLMES

Where one of two partners makes a special warranty, on the sale of goods, the purchaser may maintain his action against the partner, who made the warranty, without joining the other partner.

IN ERROR, on *certiorari*. The plaintiff below declared against the defendant below, on a warranty, in the sale of pork. The plaintiff alleged, that he purchased of the defendant one hundred pounds of pork, for which he paid him 10 dollars; and that the defendant, at the time of the sale, warranted the pork to be good and wholesome, when, in fact, it was bad and unwholesome, and totally unfit for use; and that the plaintiff, immediately after he had examined the pork, at home, returned it to the defendant, and demanded the 10 dollars, and the charges of transportation. The defendant below pleaded in abatement, that the pork sold to the plaintiff belonged to him and one *Hyde*, and that *Hyde* and the defendant were partners in trade, under the firm of *Hyde & Clark*, and that the action ought to have been brought against both partners. The plaintiff demurred, alleging, that he bought the pork of *Clark* only, and that *Hyde* lived out of the county. The justice overruled the plea in abatement, and the defendant pleaded the general issue. The plaintiff's *declaration, as to the sale warranty and breach, were fully proved, and the jury found a verdict for the plaintiff.

[* 149]

Gold, for the plaintiff in error.

N. Williams, contra.

Per Curiam. It was not necessary to make *Hyde* a party in the suit. The plaintiff had a right to bring his action against the partner who made the warranty, without joining his co-partner. The judgment below must be affirmed.

Judgment affirmed.

HUNT *against* ONDERDONK and others, Executors of
TAYLOR.

Where the attorney of one of the parties resided out of the city of New-York, but within forty miles, and had an agent in the city,

HENRY, for the defendants, moved to set aside the default, judgment, and all subsequent proceedings in this cause, for irregularity. He read an affidavit, stating, that on the 26th July, 1806, a notice from the attorney of one of the defendants, service of a notice in the cause, on such agent, in vacation, was not sufficient.

of his being concerned, was served on the agent of the plaintiff's attorney in *New-York*, by delivering the same to the partner of the agent, in his office, who accepted the same, in behalf of the agent; and that the defendants' attorney had no notice of the proceedings, on the part of the plaintiff, until the 25th day of *November*, when he was informed, that a writ of inquiry of damages had been executed. The writ issued in the cause was returnable in *August* term, the declaration was filed the 31st day of *August*, and an interlocutory judgment, for want of a plea, entered the 16th *November*; and on the 21st *November*, the inquisition of damages was filed, and final judgment entered thereon.

ALBANY,
Feb. 1808.
HUNT
v.
ORDERDONE
and others.

Johnson, contra, read the affidavit of the plaintiff's attorney, stating, that he resided at *Ant-Pleasant*, less than forty miles, to wit thirty-six miles from the city of *New-York*, where the attorney for the defendants resided, and that the notice of the defendants' attorney being *employed, had never been received by him. He contended, that where the attorneys of the respective parties resided within forty miles of each other, a service on an agent, in vacation, was not valid. (*See the 8th rule of January term, 1799.*)

[* 150]

Per Curiam. The service of the notice was not sufficient; but this being a case of executors, and on the merits disclosed, we think that the default, judgment and subsequent proceedings, ought to be set aside.

Rule granted.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, IN THE THIRTY-SECOND YEAR OF OUR
INDEPENDENCE.

JACKSON, *ex dem.* WILLIAMS and others, *against*
STOKES and THOMPSON.

A person who removed within the *British* lines during the *American* war, and died there, in *June, 1777*, was presented by the grand jury, and indicted the *5th May, 1780*, under the act of attainder of the *22d October, 1779*, for an

[* 152]
offence charged to have been committed on the *15th of April, 1777*, and being convicted, judgment was signed the *14th July, 1783*, and his estate forfeited and sold. In an action of ejectment, brought against persons deriving title under the sale by the commissioners of forfeitures, it was held, that the proceedings were regular, according to the act, and were not now to be questioned, and that the judgment on the attainder was valid and effectual:

THIS was an action of ejectment for lands in the county of *Ulster*. On the trial it was admitted, that *Daniel Clarwater's* attainder should be evidence of the attainder of *Jacob Clarwater* on the day stated in the record; and that the lessors of the plaintiff were the heirs at law of the said *Jacob*. That *Jacob Clarwater* died within the *British* lines in *June, 1777*. That the indictment against him for adhering to the enemies of this state, founded upon the act of attainder of the *22d day of October, 1779*, was presented on the *5th of May, 1780*, by the grand jury of *Ulster*, and the offence was charged therein to have been committed by him, on the *15th day of April, 1777*. That *judgment on the indictment was signed *July 14, 1783*; and that the defendant derived title under the commissioners of forfeitures. A verdict was taken for the plaintiff, subject to the opinion of the court, upon the above case. (a)

(a) The act of attainder of *October 22d, 1779*, made it lawful for grand jurors to prefer bills of indictment against persons who should at the time be deceased, for the offence of adhering to the then enemies of this state, committed by such persons, in their life-time; and that it should be no objection that the offence was committed out of the county in which the indictment should be found; that upon notice being given, according to the form prescribed in the act, and a neglect to appear, the defendant, whether in full life or deceased, should be deemed guilty, and should forfeit their estates and such forfeitures

deriving title under the sale by the commissioners of forfeitures, it was held, that the proceedings were regular, according to the act, and were not now to be questioned, and that the judgment on the attainder was valid and effectual:

L. Elmendorf, for the plaintiff.

Sudam, for the defendant.

NEW-YORK.
May, 1808.

JACKSON
v.
STOKES and
THOMPSON.

KENT, Ch. J., delivered the opinion of the court. The convictions under the act of 1779, of deceased persons, were out of the ordinary course of practice, and cannot be tested by ordinary rules. They were in the nature of bills of attainder; and the legislature most clearly intended, that the convictions and forfeitures under the act, should apply as well to offences committed prior, as subsequent to the passing of the law. In giving each part a construction, the whole act is to be taken together. Its object is declared to be the forfeiture and sale of the estates of persons who had adhered to the enemy, and many persons were by name, *ipso facto*, convicted and attainted of an antecedent offence. The formality of an indictment and notice, in the case of a deceased person, was a substitute for the specification of the name of such person in the statute, and was attended with equal effect in respect to the forfeiture *of his estate. The conviction, in order to save the rights and prerogative of the state, was made to have relation back to the death of the person convicted; and as the prosecution was made to apply to offences committed prior to the passing of the act, so it was immaterial whether the offender was alive or dead upon that day. The law declares, that the indictment and conviction shall be equally operative whether the defendant was dead or in full life. The proceeding in question is to be resolved into the plenitude of legislative authority, and we have only to inquire what was the real intent and meaning of the law. The constitution authorized the legislature to pass bills of attainder for crimes committed during the revolutionary war.

[* 153]

We are of opinion, therefore, that the title derived from the state is valid, and that judgment must be rendered for the defendants.

Judgment for the defendants.† † 2 *Caines* 164

should affect the estates whereof the defendants were seised, at the time of their deaths, respectively, and the estates should vest in the people of this state, at and from the day charged in the indictment, most distant from the day of the taking thereof. The act further declared, that being at any time, since the 9th day of *July*, 1776, within and under the government of the *United States*, and afterwards voluntarily withdrawing within the *British* lines, was evidence of the offence, for which every such person might be indicted and convicted in pursuance of the act.

NEW-YORK
May, 1808.

M'COLLUM
v.
BARKER

M'COLLUM *against* BARKER.

On a writ of error from a court of common pleas, it appeared by the record, that after judgment by default, in an action of *assumpsit*, a jury was summoned, and the damages assessed in the presence of the court, and judgment entered for the amount, without an inquisition returned; it was held, that the proceedings were regular, as the court may

[* 154]
assess the damages without the intervention of a jury.

THIS cause came before the court on a writ of error, from the Court of Common Pleas of the county of *St. Lawrence*.

The record stated, that the defendant in error declared against the plaintiff in error, in the court below, in *assumpsit* for work, labor and services, and for money laid out, &c. The defendant below suffered judgment by default, and the sheriff was commanded, that he cause to come before the judges and assistant justices, at the court-house, &c., on the 4th of *June*, 1806, twelve, &c., to inquire and assess the damages, &c. On the same day, both parties appeared before the judges and assistant justices, &c., and the jury being sworn, assessed the damages to 70 dollars besides the costs, &c., upon which final judgment was entered.

The error assigned was, that there was no writ of inquiry or inquisition, or return thereto, on record in the clerk's office of the said Court of Common Pleas.

**Van Vechten*, for the plaintiff in error.

H. Bleecker, contra, cited 2 *Wilson*, 374. 3 *Wilson*, 62. 2 *Saund*. 107. n. 2.

Per Curiam. As the assessment of damages in the above case was only to inform the conscience of the court, who might themselves have assessed the damages without the intervention of a jury, we do not perceive any objection to the proceeding which took place. If the court might have dispensed with the jury, they could of course have dispensed with an inquisition formally signed and sealed by the jury, who acted in their presence. The execution of the writ in the presence and under the direction of the court, must afford at least equal satisfaction, as if it had been executed before the sheriff alone; and if the court are willing to submit to the trouble of presiding at the inquest, it is the safer mode for the parties. The judgment below ought, therefore, to be affirmed.

Judgment affirmed.

DUNNETT *against* TOMHAGEN.NEW-YORK,
May, 1803.DUNNETT
v.
TOMHAGEN.

FROM the return of the *certiorari*, directed to the Justices' Court, in the city of *New-York*, the following facts appeared:—

The defendant in error, who was the plaintiff below, declared for wages due to him as a mariner on board the ship *Sarah*, of which the plaintiff in error was master, on a voyage from *Greenock* to *New-York*.

The defendant below pleaded the general issue, with notice of special matter. The cause was tried before the justices, by consent, without a jury, and the following facts appeared. The plaintiff was a mariner on board the *Sarah*, on a voyage from *New-York* to *Greenock*, and back, *at 22 dollars per month. That the ship performed the voyage to *Greenock* in safety, and was abandoned as a wreck, on her homeward voyage, after being from port two months. The crew, in order to save the cargo, threw overboard their own clothes and other property. By their exertions they saved from the ship, so abandoned as a wreck, seven boxes of merchandise, which they stowed in the long-boat, and then left her. After being some time at sea, they were taken up by the sloop *Morning-Star*, and arrived safe at *New-York*, with the long-boat and merchandise. The property so saved, and the long-boat, were libelled in the District Court at *New-York*, by the crew of the sloop *Morning-Star*, for salvage. After the merchandise and long-boat were in the custody of the marshal, an agreement was made between the libellants and the owners of the merchandise, (the plaintiff being in no wise privy thereto,) that the property should be sold at auction, and that, from the proceeds, the auctioneer should pay to the libellants such sum as should be awarded for salvage by two arbitrators, who awarded a sum in favor of the libellants, but how much did not appear. The seven boxes of merchandise were owned by sundry merchants in *New-York*, and the captain and owners of the *Sarah* had no interest in them, beyond their *lien* (if any) for freight. The outward wages only had been paid to the plaintiff. The plaintiff and all the crew gave receipts in full; and when the receipts were demanded by the owners, they informed the men, that they should not have their wages unless they signed them. The mate and one seaman refused, and the plaintiff signed his mark, but received his pay for the outward voyage only. The boxes of merchandise sold at auction for 1,600 dollars. The wages due to the crew on the homeward voyage, at the time the ship was abandoned, amounted to 414 dollars.

The court below decided, that the *Sarah* could not, in contemplation of law, be considered as wrecked, nor the merchandise and long-boat in such a state of peril, as to entitle the crew of the *Morning-Star* to salvage, to the *pre-

During a voyage from *Greenock* to *New-York*, a ship called the *Sarah*, was, from necessity, abandoned by the crew as a wreck: and before leaving her, the seamen took out seven boxes of

[* 155]

the cargo, into the boat, and were, afterwards, taken up at sea by a vessel called the *Morning-Star*, and brought to *New-York*.

The merchandise saved was libelled by the crew of the *Morning-Star*, for salvage. In an action

brought by seamen of the *Sarah* against the master, for his wages from *Greenock* to the time the ship was abandoned, it was held, that no freight was earned, and that the seamen were not, therefore, entitled to wages; though they might have an equitable *lien* on the goods saved, for a compensation in the nature of salvage.

[* 156]

NEW-YORK,
May, 1808.

DUNNETT
v.
TOMHAGEY.

judice of the seamen; that as the owners had received the goods, and thus entitled the captain of the *Sarah* to his freight therefor, and that as sufficient had been saved to pay the seamen's wages, and as the plaintiff had made a sacrifice of his own property, to save that put into the long-boat, the court, in the exercise of their legal and equitable powers, gave judgment for the plaintiff for his two months' wages, from the time of the departure of the ship from *Greenock* to her abandonment at sea.

On the above facts, the case was submitted to the decision of this court, without argument.

KENT, Ch. J., delivered the opinion of the court.

It is the general rule of the marine law, that freight is the mother of wages, and that the safety of the ship is the mother of freight. The reason of the rule is, that the seamen may have an interest in the safety of the ship, and may thereby be induced not to desert her in cases of danger, but to use their utmost endeavor, even at the hazard of their lives, for her preservation.

No freight was earned in this case on the homeward voyage, because no part of the cargo was delivered by the ship. The contract was not fulfilled; the voyage was not performed; and no freight was earned; it follows, as a necessary consequence, that no wages were due.

The salvage of part of the cargo does not take this case out of the general rule, because no freight was earned by the ship on the goods saved. It is not the saving of the cargo, but the earning of freight that entitles the seamen to wages. The owners of the ship had no valid claim for freight, as for a part performance of the entire contract, because the fulfilment of the contract was not dispensed with by any act of the owners of the goods, nor, indeed, was there even a part performance by the owner of the ship. A salvor, and not the ship-owner, was here the deliverer of the goods saved. The seamen might, perhaps, have had a valid *lien* on the goods saved, for an equitable *compensation, in the light of salvage, but this gave them no right of action against the ship-owners or master, on their contract for wages. The claims of salvage and for wages are totally distinct, and are to be tested by different rules. It must, however, be admitted, that the loose manner of using these terms in some of the books, and in the old marine codes, tends to mislead; but the confusion is easily cleared, when the terms themselves, and the principles upon which those claims respectively rest, come to be understood and applied with due precision.

The court are, therefore, of opinion, that the judgment below must be reversed.

Judgment reversed

NEW-YORK,
May, 1808.SMITH *against* LEWIS.SMITH
v.
LEWIS.

THIS cause came before the court on a writ of *error* from the *Dutchess* Common Pleas.

The declaration in this case, in the court below, stated, that the defendant brought an action of trespass on the case against the plaintiff and four other persons, at *Fairfield*, in the state of *Connecticut*; that the action was commenced by a writ of attachment, dated the 4th day of *April*, 1799, and made returnable in *Fairfield* county court, on the 3d *Tuesday* of *April*, 1799, and which writ of attachment contained a declaration, in substance, as follows: That at *Brookfield*, on the 26th day of *January*, 1796, the defendants affirmed unto the plaintiff, *Lewis*, that *Austin Nichols*, one of the said defendants, was the rightful owner in fee, of 45,000 acres of land in *Virginia*, and described by metes and bounds. That the said *Austin Nichols* offered the same for sale; that he and the other defendants, well knowing that the said *Austin* was not the owner of the said tract, and that the same was of no value, &c., did conspire to induce the plaintiff to buy a part of the said tract, at 25 cents per acre, and with intent to defraud the plaintiff, and to divide the profits among themselves. That the defendants did, for that purpose, agree *severally, to represent to the plaintiff, that the said *Austin* was the owner, and that the said land was of an excellent quality, &c. That the defendants, for the purposes aforesaid, did agree that *Benjamin Bostwick*, another of the defendants, should appear to be the purchaser of one fourth, at the price aforesaid. That the defendants did also agree, that *Aaron Gregory*, one of the defendants, should apply to the plaintiff to be let in for a small part of the purchase, &c., and the plaintiff averred, that the defendants executed their purposes, &c., and that the plaintiff, by means of the fraud practised upon him by the several defendants' conspiring together, did, on the 12th of *February*, 1796, at *Newtown*, purchase of the said *Austin*, one fourth of the tract, and did pay to him 2,812 dollars 25 cents for the same, and that the defendants divided the same; and the plaintiff averred, that the said *Austin* had no title; and that the said tract was mountainous and good for nothing; and the defendants all well knew the same, and that all their said allegations were false; by all which frauds he, the said *Walker Lewis*, was damnified to 4,900 dollars, &c.

The declaration in the present suit further stated, that the said attachment was duly served on *Smith* and the other defendants, and returned, and the action entered in court. That the suit was legally removed into the Superior Court of that state, and the several defendants, in the Superior Court, at *Fairfield*, on the 2d *Tuesday* in *January*, 1802, except *Austin*

No action will lie against a person in this state for suborning a witness to swear falsely in a cause in another state, whereby a judgment was given against the defendant in that state, contrary to the truth and justice of the case.

[* 158

NEW-YORK,
May, 1808.

SMITH
v.
LEWIS.

[* 159]

Nichols, who was defaulted, pleaded the general issue, not guilty. That the cause was tried by a jury, who found a verdict for the plaintiff, *Lewis*, and assessed his damages to 3,860 dollars 90 cents, and judgment was rendered thereon. That an execution issued the 29th *July*, 1802, and the real estate of *Smith* (the now plaintiff) was seized and set off in part payment of the judgment, to the amount of 808 dollars 86 cents. The declaration further stated, that all the said proceedings, in the said suit, were regular, but that the said *Lewis*, (the now defendant,) in order to prove his action on the said trial, did, in *Luzerne* county, in *Pennsylvania*, corruptly suborn one *Stephen *Burritt*, to make a false deposition, on the 10th day of *July*, 1802, which deposition was read on the said trial; that this deposition went to support fully the whole allegation of fraud in the declaration. The plaintiff then averred, that the said *Burritt*, in making the said deposition, was guilty of wilful and corrupt perjury; and that the present defendant well knew it to be false when he procured it, and when he offered it in evidence, &c. That the deposition was procured and read according to the laws of *Connecticut*, but that the present plaintiff, and the other defendants, had no knowledge of it, or its contents, until the same was read to the jury, and so were wholly unprepared to meet it; that the said *Walker* made *Azor Ruggles* a party to the suit for the sole purpose of preventing him from being a witness for the defendants; and that the said *Azor* would have disproved the contents of the said deposition; that the court and jury relied upon the deposition, as material testimony produced upon the trial; that the plaintiff, and the other defendants, were not guilty of any such combination or fraud, &c., and that the jury were wholly deceived and misled by the said deposition; and that, by this fraudulent and corrupt conduct of the defendant, the plaintiff hath sustained damages to 10,000 dollars, &c.

To this declaration the defendant below demurred, and the plaintiff joined in demurrer. The court below, having given judgment for the defendant, the plaintiff brought his writ of error to this court. There were two grounds of demurrer. 1. That the declaration did not contain a sufficient cause of action. 2. There were two separate and distinct causes of action set forth.

The court having decided on the first ground, it is unnecessary to take notice of the second.

[* 161]

P. Ruggles, for the plaintiff in error. There can be no doubt that the plaintiff has sustained a serious injury by the fraudulent conduct of the defendant; and the only question is, whether the law affords him any remedy for *that injury. The plaintiff does not impeach the judgment of the court in *Connecticut*, which, on the evidence as it appeared before them, was no doubt correct; but he alleges that it was obtained by

perjury, and that the defendant ought to make reparation for the damages caused by his malpractice and deceit in procuring that judgment. The merits of the judgment are no more called in question in this case, than they were in that of *Moses v. Macfarlane*, (2 Burr. 1005.) cited by the counsel for the defendant on the argument in the court below. Lord Mansfield, in that case, observes, "The ground of the action is not that the judgment was wrong, but that (for a reason which the plaintiff could not avail himself of against that judgment) the defendant ought not, in justice, to keep the money." "Money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against that judgment." His lordship puts several cases, not so strong as the present. "Suppose," says he, "an endorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the endorser, who knew nothing of the payment. Suppose a man recovers upon a policy for a ship, presumed to be lost, which afterwards comes home, or upon the life of a man, presumed to be dead, who afterwards appears; or upon the representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent." In all those cases, the former judgment of the court was shown, else no cause of action could be made to appear. If the party in those instances was not bound to be prepared against facts which must frequently happen in the course of business, how is he to come prepared against perjury, especially when the plaintiff had deprived him of the means of detection? But in the case of *Hanford v. Pennoyer*, (a) decided in the Superior Court of the state of Connecticut, the precise point in question arose. The case was shortly this: *Pennoyer* brought his action *against *Hanford* in the Court of Common Pleas, and stated, in his declaration, "that *Hanford* had before sued him in trespass *quare clausum fregit*, before a justice, and that he called one *S. H.* as a witness, who swore falsely and corruptly, whereby judgment was rendered against him, (*Pennoyer*,) and for that false oath and the damages he had sustained, he brought his suit," &c. A verdict was found for the plaintiff for 70 dollars damages, and a motion in arrest of judgment was overruled, and judgment rendered for the plaintiff. *Hanford* brought a writ of error to the Superior Court, who affirmed the judgment of the Common Pleas; who, in giving their reasons, observed, "that it was a fundamental principle of law, that for every injury there was a remedy; that the plaintiff in the court below had his right taken from him by perjury, and it was no answer to say, it was by the judgment that the party is aggrieved, for the judgment was obtained by perjury; nor that the statute has provided a punishment for perjury, for the

NEW-YORK,
May, 1802.

SMITH
V.
LEWIS

[* 161]

(a) The counsel read a manuscript copy of the record, which contained the case and the reasons of the judgment, in August, 1802

NEW-YORK,
May, 1803.

SMITH
v.
LEWIS.

statute does not take away the common law right. (2 *Wils* 145. 3 *Burr.* 1419. 1 *Black. Rep.* 427. 1 *Com. Dig.* 168. *Action on the Case, A.*) It is not true that the judgment is attacked by this action, or its legality and binding force called in question; the action is founded on the very principle that the judgment was properly rendered, and binding on the party. It is by means of the judgment so obtained by perjury, that the party is subject to damage; and notwithstanding a recovery for the perjury, the judgment must remain in full force. It is no objection to this action, that the party aggrieved may get relief from the judgment by writ of error, or a new trial, for it must often happen, that no error appears on the record; and the party aggrieved ought not to be put to the trouble and expense of a new trial, nor run the risk of losing his evidence by the death or removal of witnesses."

[* 162]

Several analogous cases may also be found in the *English* books. In *Skelhorn v. Harison*, (*Cro. Eliz.*) where bail in an inferior court had knowingly procured insufficient bail to be put in, on a *habeas corpus* in the cause, in the Court *of *K. B.* it was held, that an action on the case would lie for the *falsity*. In *Baron v. Sleight*, (*Cro. Eliz.* 618.) which was an action on the case for deceitfully procuring a *scire facias* to be sued out, and two *nihil*s returned, against a person who was not bail, in which judgment was rendered against him, and execution issued, on a motion in arrest of judgment, the court held the action to be maintainable, because the judgment was obtained by fraud and covin, and to deceive the plaintiff. *Perren v. Budd* (*Cro. Eliz.* 793.) was also an action on the case, for deceitfully procuring a *nil debet* to be entered in the name of the plaintiff, and though it was objected, that the entering of the *nil debet* was a judicial act, and therefore no action would lie, yet the court said, that the action was maintainable, for the procuring the *nil debet* to be entered was an abuse of the court, whereby the party had been injured.

So in *Steer v. Scoble & Pensent*, (*Cro. James.* 667.) which was an action on the case for maliciously and deceitfully prosecuting bail, knowing that the principal had surrendered in their discharge, it was moved in arrest of judgment, that such an action would not lie, because it was the act of the court to award the process; but the court gave judgment for the plaintiff, which, on a writ of error, was afterwards affirmed. In *Coxe v. Smith*, (1 *Lev.* 119.) the action was for making a false affidavit against the plaintiff, in consequence of which he was turned out of his office. After a verdict, it was moved in arrest of judgment, on the ground that no action would lie for making a false oath; but the court said, the action is not founded on the oath, which is only an inducement to the malicious procurement to have the plaintiff turned out of office, and the verdict having found that it was falsely and maliciously done, the plaintiff was entitled to judgment. In the case in *Rolles*, 128

(1 *Rol. Abr.* 100. pl. 1.) "it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name, of my land, this shall bind me for ever; and therefore I may have a writ of deceit against him who acknowledged it." The novelty of the present action *furnishes no legal objection against it; (*Paisley v. Freeman*, 3 *Term*, 63, 64. 2 *Wils.* 146.) and every principle of justice is in its favor.

NEW-YORK,
May, 1808

SMITH
V.
LEWIS.

[* 163]

Tallmadge, contra. The case of *Skelhorn v. Harrison*, which has been cited, was overruled in the subsequent case of *Eyres v. Sedgwick*, (*Cro. Car.* 601.) which was an action for making a false affidavit in chancery, by reason of which the plaintiff was imprisoned, and put to great expense, and it was held, that no such action would lie; and the court, in taking notice of the case of *Skelhorn v. Harrison*, say, that the suit was compromised, and no judgment given, it being the better opinion that the action was not maintainable. In *Dampton v. Sympson*, (*Cro. E'iz.* 520. See also 2 *Roll. Rep.* 195. 198. 2 *Anders.* 47. *Hutton*, 11. *Danv.* 195. 1 *Saund.* 131. 2 *Burr.* 810. 1 *Leo.* 107. *Kirby's Conn. Rep.* 7.) it was expressly decided, that an action on the case would not lie against a person for perjury. The case of *Moses v. Macfarlane* was, perhaps, correctly decided on the point in litigation before the court; but much of the reasoning of Lord *Mansfield*, in that case, has since been questioned and overruled. (2 *Hen. Black.* 414, 415. *Eyre*, Ch. J. 7 *Term*, 269. 2 *Esp. Cas.* 546. *Evans's Pothier on Oblig.* vol. 2. p. 350.) Yet in that case, Lord *Mansfield* said, "that it was most clear, that the merits of a judgment can never be overhauled by an original suit, either at law or in equity; and until the judgment is set aside or reversed, it is conclusive as to the subject-matter of it, to all intents and purposes." This suit is certainly an attempt to overhale the judgment of the Superior Court of the state of *Connecticut*. Such an action is against the settled principles and policy of the law. If maintainable, there will be no end to litigation. It will be again trying the same cause which has already been regularly tried and decided by a court of competent jurisdiction, in which, if the plaintiff was aggrieved by a verdict, obtained by surprise, or through imposition, he might have obtained relief, by an application to the liberal discretion of the court in granting new trials, or in a court of equity. The verdict can never be inquired into, in this way, by a collateral suit. The judgment of the court must be considered as final and conclusive. *Res judicata pro veritate accipitur.* (*Reg. Jur.* 207. *Dig. lib.* 50. tit. 17.) After judgment, the subject-matter *of controversy cannot be put in litigation a second time. (4 *Term*, 432. note.)

[* 164]

Again, it is too late, after a trial, to impeach the testimony of a witness. (7 *Mod.* 54. 1 *Term*, 717. 2 *Term*, 713. Vol. III.

NEW-YORK,
May, 1808.

SMITH
v.
LEWIS.

Trial of A. H. Rowan.) Nor do courts ever grant new trials on account of objections to the competency of witnesses discovered after a trial. (*Tidd*, 811. 1 *Bos. & Pull.* 227.) Where a person has recovered a judgment by means of the perjury of a witness, the party aggrieved may find relief in a court of equity, because he would be too late to obtain it in a court of law. (*The King v. Borten*, 4 *East*, 475. *Rex v. Eden*, 1 *Esp. Cas.* 48. *Peake's N. P.* 12. 2 *Vern.* 464.) In the case of *Page v. Camp*, decided in the Superior Court of the state of *Connecticut*, the court were of opinion, that an action on the case for perjury, if maintainable, would not lie until after the conviction of the witness; and that a judgment of one court could never be examined by another court of the same jurisdiction, as it would, in fact, be trying the cause a second time.

Ruggles, in reply. That a new trial will not be granted on the ground of objections to the competency of a witness, or for the falsehood of his evidence, discovered after the trial, is an additional reason for supporting this action, for otherwise the party would be remediless. In the case of *Merritt v. Hampton*, (1 *Esp. Cas.* 98.) the judgment was recovered on a *cognovit* given long after the receipt set up by *Merritt*, and was considered as a voluntary payment. When the judgment was given, *Merritt* had the means of defeating it in his hands, had the receipt been genuine, which was denied. Wherever a former judgment is pleaded in bar to an action of *assumpsit*, the plaintiff avers that the claim was not inquired into on the former trial, though the pleadings would have admitted of such inquiry. (*Seddon v. Tutop*, 6 *Term*, 607. *Hitchin v. Campbell*, 3 *Wils.* 308. 2 *Wm. Black.* 327. See also *Manny v. Harris*, 2 *Johnson*, 24.) In all such cases, it is necessary to show, by proof, on what evidence the jury founded their verdict in the former suit.

[*165]

SPENCER, J. The declaration in this cause contains but one count; it sets forth, minutely, a suit brought by the defendant against the plaintiff and others, in a court *of common pleas in the state of *Connecticut*, and afterwards removed to the Superior Court of that state, in which the defendant prevailed and obtained a judgment, after a trial before a jury, and the payment of that judgment by the plaintiff. It is then alleged, that the defendant, in order to prove the matters necessary to maintain his suit, unlawfully and corruptly, and with a view and design to deceive the court and jury, and to injure the plaintiff, procured one *Stephen Burritt* to commit wilful and corrupt perjury, by making a deposition altogether false, and known to be so by the defendant, and which was given in evidence on the trial; on which evidence and no other, the defendant prevailed in the said suit; also alleging, that the defendant joined one *Azor Ruggles*, as a defendant in that suit,

130

to prevent his testifying to the facts he knew in that cause, and that the truth might be suppressed; that the said *Azor* could have disproved the falsehoods testified by the said *Burritt*; and that, but for the false deposition of *Burritt*, the jury would have found a verdict for the plaintiff and the others sued with him; and that there was no evidence of any weight to maintain the said issue, except that of *Burritt*.

NEW-YORK,
May, 1808.

SMITH
v.
LEWIS

To this declaration the defendant demurred specially, insisting that distinct matters are alleged in one count, to wit, the subornation of *Burritt*, and the joining *Ruggles* in the suit, to prevent his being a witness. To this there was a joinder: and judgment was given for the defendant.

The questions presented are, 1. Is it actionable to suborn a witness to bear false testimony, whereby a verdict is given contrary to the truth and justice of the case?

2. Is the declaration defective in containing the double allegation, that the defendant did suborn *Burritt*, whereby the plaintiff lost his cause, and that he also joined *Ruggles* fraudulently, to prevent his being a witness, whereby *Burritt* could not be detected in his perjury?

However just and reasonable it may appear, upon the first view of the proposition that a man who has, by perjury, *injured another and subjected him to the unjust payment of a sum of money, should be answerable, yet on a nearer inspection, when the mischiefs resulting from upholding that proposition are considered, the conclusion will be, that it would be dangerous in the extreme to sustain this action.

[* 166]

First, however, as a point adjudicated; the decisions, whenever the point has arisen, are uniformly against the maintenance of the action. The question arose in the case of *Dampton v. Sympton*, (*Cro. Eliz.* 520.) whether the party committing perjury in falsely swearing, on a trial, that a fountain of silver was worth only 180^l. when it was worth 500^l. was liable in an action, and it was held by all the judges, except one, that the action would not lie, and among other reasons not very conclusive, the court was influenced by its being totally unprecedented.

In the case of *Eyres v. Sedgwick*, (*Cro. Jac.* 601.) it became a question, whether a person who had made a false affidavit in chancery, whereby the plaintiff was imprisoned by the chancellor, was liable to an action for the injury, and it was held by all the judges, except *Houghton*, that to punish this perjury by an action on the case, under pretence of a false oath, should not be suffered; and *Houghton*, who differed, admitted that if the defendant had come in by process of law as a witness, it had been otherwise, for then he would have been punishable by indictment; but not in the case then before the court. *Doderidge, J.*, in giving his opinion, says, that in the case of *Skelhorn v. Harrison*, (*Cr. Eliz.* 714.) which was an action for putting in bad and false bail, to discharge other

NEW-YORK,
May, 1808.

SMITH
v.
LEWIS.

good bail, the better opinion was, that the action was not maintainable. The case of *Coxe v. Smith*, (1 *Lev.* 119.) is not a variance with the cases cited, for there the affidavit, whereby the plaintiff was removed from office, was not considered as the *gist* of the action, but only inducement to prove the malicious intent.

[* 167]

These are all the cases which have been cited or met with, that bear on the question, and although they are all cases against the party committing the perjury, their application *cannot be doubted; for if the very person who has committed the supposed injury is not answerable, surely the person procuring it will not be amenable. According to the rule of Lord *Coke*, it is better to submit to a particular inconvenience, than introduce a general mischief, which, in my opinion, would be the case, were we to maintain this action. If a perjury has been committed, let the defendant, who is alleged to have procured it, be punished according to the known law of the land, and not in a way altogether novel and unprecedented, nay, even against decisions. This case affords a sample of the danger of maintaining the action. *Ruggles* is alleged to have been made a party fraudulently, to prevent his being a witness, and most probably *Ruggles* is to be the witness to disprove the truth of *Burritt's* deposition. I do not mean to say any thing against him; but it is obvious that he must feel strong inducements to retort on *Burritt* for having implicated him in the fraud. The old rule is the safest, that the parties must come prepared at the trial to vindicate themselves, and to detect the falsity of the testimony brought against them, if it be untrue; or they must take their chance of obtaining a new trial, by showing that they were surprised, and that they have detected the imposition.

I confess that I should be afraid to make a precedent, that would be so productive of litigation, and that would open a door to so much perjury, as the one we are now called upon to establish.

The fraudulently joining *Ruggles* in the suit has not been pretended to be of itself a cause of action, and it becomes unnecessary to examine how far the declaration is bad on that account, since it is vicious in that part which contains the *gist* of the action. A decision of the Superior Court of *Connecticut* has been cited, to show that an action like this has been sustained; though I respect the decisions of that court, I cannot yield my settled conviction to any unauthoritative adjudication on the subject.

My opinion, therefore, is, that the judgment below ought to be affirmed.

[* 168]

*KENT, Ch. J. This suit is an attempt to overhale the merits of the verdict and recovery in *Connecticut*. The defendant below recovered damages of the plaintiff, in that state, on a

charge of fraud, in the sale of *Virginia* lands ; and the plaintiff now alleges that there was no such fraud, and that the testimony which was produced, in support of the charge, was procured by the corrupt acts of the defendant. If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. The injustice of the recovery appears to be the real *gravamen*. The declaration does, in substance, tell the defendant that he had obtained a verdict and judgment against the plaintiff, which he ought not to have done, whereby the plaintiff is injured, and claims a return of the money so unjustly recovered. " Shall the same judgment," says Ch. J. *Eyre*, in the case of *Philips v. Hunter*, (2 *H. Blacks.* 414.) " create a duty for the recoverer, upon which he may have an action of debt, and a duty against him, upon which an action will lie ? This goes beyond my comprehension." It would be against public policy and convenience ; it would be productive of endless litigation, and it would be contrary to established precedent, to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary at the trial of the first suit. The general law of the land, and the rules of every superior court of competent jurisdiction, sufficiently provide against forcing a party to trial, without giving him a due opportunity to prepare for his defence, and cases of surprise and injustice are generally redressed by the discretionary power of the courts in setting aside verdicts. We are to intend that the judgment in *Connecticut* was fairly obtained in the regular course of justice, and it is conclusive, as to the subject-matter of it, until it be set aside or reversed, either by the same court, or by some other court having appellate jurisdiction. It never can be opened in a collateral action. It is as binding upon the parties here, as it is in that state ; for foreign judgments *are never reëxamined, unless the aid of our courts is asked to carry them into effect by a direct suit upon the judgment. The foreign judgment is then held to be only *prima facie* evidence of the demand ; but when it comes in collaterally, or the defendant relies upon it under the *exceptio rei judicate*, it is then received as conclusive ; this distinction is taken and stated by some of the most approved jurists on the law of nations. The general doctrine in *Moses v. Macfarlane*, (2 *Burr.* 1005.) has been strongly questioned, and deservedly shaken by subsequent decisions, and especially by the case of *Merrit v. Hampton*, (7 *Term.* 269.) but if that case was admitted to stand in full force, it would not apply, as the plaintiff was there allowed to recover back money adjudged to the defendant in the Court of Conscience, because from the nature of the jurisdiction below, the plaintiff could not avail himself of his legal defence ; no such pretext is alleged as a ground of the suit in the case before us.

The case of *Hanford v. Pennoyer*, which was decided in the Superior Court of *Connecticut*, 1802, is also inapplicable ; for

NEW-YORK.
May, 1808.

SMITH
v.
LEWIS

[* 169]

NEW-YORK,
May, 1808.
DE FONCLEAR
v.
SHOTTEN-
KIRK.

the suit there was not against the party to the judgment, but against a third person, by means of whose fraud and perjury, the judgment was obtained; and even such a suit against a witness is, I apprehend, an innovation upon the *English* law, for it appears to have been frequently and directly denied by the *English* authorities. (*Dampart v. Sympson*, *Cro. E.* 520. *Eyres v. Sedgwick*, *Cro. J.* 601. *Harding v. Bodman*, *Hutton*, 11.)

I am, accordingly, of opinion, that the judgment below must be affirmed.

VAN NESS, J., declared himself to be of the same opinion.

YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment affirmed.

[* 170]

*DE FONCLEAR *against* SHOTTENKIRK.

Where there was contradictory or doubtful evidence, whether a sale of a chattel was absolute or not, the court refused to set aside the verdict of a jury. Where a slave was delivered to a person to be kept, or upon trial, and the bailee suffered the slave to go to the next village in the evening, when the slave ran away, it was held, that the bailee was not responsible.

THIS was an action of *assumpsit*. The declaration in the case contained two counts; the first count was on a special agreement, by which the defendant agreed to take a negro slave, belonging to the plaintiff, upon trial for a day or two, and if the negro did not like the defendant for a master, the defendant undertook to return him. The second count was, on the sale of the negro, for the purchase money. The defendant pleaded *non assumpsit*.

The cause was tried at the last *Montgomery* circuit, before Mr. Justice *Van Ness*.

From the evidence given at the trial, which was minutely detailed in the case, it appeared that a conversation had taken place between the plaintiff and the defendant, relative to the sale of a negro slave, belonging to the plaintiff, and that the price was mentioned to be 300 dollars. The slave not appearing satisfied with the change of masters, the plaintiff's wife said to him that he might go a day or two, and see how he liked the defendant. The defendant said he would use him as well as one of his own family. One of the witnesses heard the defendant say, on the next day, that the negro had gone home with him from the plaintiff's, and worked on his farm; that towards evening he wanted to go to the village of *Johnstown* to get some tobacco; that the defendant told the negro he might go to *Johnstown* after supper; the negro went out after supper for that purpose, as he pretended, but never afterwards returned, either to the defendant or the plaintiff. The defendant gave notice to the plaintiff of his elopement, and

refused to take any measures to pursue or bring back the negro. It appeared also, that the defendant had said, on the day the negro went to his house, that the writings were to be drawn the next evening, as he was so busy then, that he could not attend to it.

NEW-YORK,
May, 1808.

DE FONCLEAU
V.
SHOTTEN-
KIRK.

[* 171]

*On the part of the defendant, it was proved that the plaintiff, after the negro ran away, said "he had lost 300 dollars, for in a day or two he had sold him." The plaintiff was a *Frenchman*, and did not speak *English* well. Another witness testified, that a few days previous to the alleged sale, the plaintiff had observed, that he was afraid that the negro was going to run away, and wished to know how to secure him; and that after he had run away, he went to the printer, and directed an advertisement to be printed, offering a reward of ten dollars to apprehend the negro; but afterwards requested the advertisement to be postponed until he had taken advice.

The judge charged the jury, in substance, that if, from the evidence, they should be satisfied that the sale of the negro was absolute, the plaintiff would be entitled to their verdict; but if the jury should be of opinion, that the sale was not absolute, but that it was a sale upon trial, that then, while the slave remained in the possession of the defendant, he was bound to take as good care of him, as he would of his own slave; and that if he had not done so, the plaintiff was entitled to a verdict; that if the jury were of opinion that the defendant was to take the negro upon trial, and that the sale was to become absolute or not, at the defendant's election, depending on the negro's willingness or unwillingness to stay with him, (in which point of view he thought the evidence placed the contract,) then, as the negro had run away before the expiration of the time within which such election was to be made, the defendant was not liable; that if the sale was not absolute, it was incumbent on the plaintiff to show, clearly, on what terms it was made; that the negro, in his opinion, while in the defendant's possession, was at the risk of the plaintiff, and that the defendant was not bound to pursue him, having given notice of his flight to the plaintiff. The jury found a verdict for the defendant.

A motion was made to set aside the verdict, on three grounds. 1. As against evidence. 2. For the misdirection of the judge. 3. On account of newly discovered evidence.

**Metcalf*, for the plaintiff. 1. There was sufficient evidence of an absolute sale, and the jury should have been so directed. Three things are necessary to constitute a contract of sale; a thing to be sold, a stipulated price, and the consent of the acting parties. (*Pothier trait du Contrat de Vente*. n. 3.) As soon as the parties have agreed on the thing, and the price to be paid, (*Just. Inst. lib. 3. tit. 24. Dig. lib. 18. tit. 6. l. 8.*) or, in other words, as soon as the bargain is struck, the property in the thing is transferred to the vendee. (2 *Black. Com.*

[* 172]

NEW-YORK, 448.)
May, 1808.

DR FOUNCLEAR
V.
SHOTTEN-
KIRK.

A distinction is to be made between the *contract itself*, and the *execution* of it. The contract is complete as soon as the commodity and the price are agreed upon. The *execution* of it consists in the delivery of the article by the vendor, and the payment of the money by the vendee. (*Puffendorf, Law of Nat. and Nations, lib. 5. c. 5. § 3.*) In the present case, the contract of sale was complete; and the negro was, in fact, delivered to the defendant, and went home with him. This shows that there was an end to all discussion as to the terms of the contract of sale, and that it was complete; and it remained only to have it reduced to writing, a thing not essential to the sale of a chattel. (*Puffendorf, lib. 5. c. 5. § 2. ad finem.*) The objections to the slave could not affect the contract between the parties, unless the contract was clearly made to depend on his consent, and that expressed in the contract. There was no evidence of any such condition. The expression used by the plaintiff, after the slave ran away, was under the mistaken idea, that it was essential to the contract of sale, that it should be in writing; and as he was a foreigner, imperfectly acquainted with our language, great allowance is to be made.

2. There may be a sale *upon trial*. Such a contract of sale is perfect, and the thing delivered upon trial remains at the risk of the vendee. (*Pothier du Contrat de Vente. n. 264. 266. Domat. lib. 1. tit. 2. § 4. art. 8.*) Considering, however, the delivery on trial, as a bailment, or lending for use, the defendant did not use that diligence in keeping the negro, which the law requires of him. (1 *Bac. Ab.* 243. *Jones on Bailment*, 118, 119, 120.) He ought not to have permitted him to go to *Johnstown*, in the evening.

[From the opinion delivered by the court, it is unnecessary to state the evidence or the observations of the counsel on the third point.]

[* 173]

**Cady and Van Vechten*, contra. 1. The only question is, Whose property was the slave at the time he ran away? The whole evidence as to the sale, was submitted to the jury, who were competent judges of the fact. The plaintiff's directing the slave to be advertised, and saying that *his slave* had run away, clearly showed that he still considered him as his property. That writings relative to the sale were to be drawn and executed by the parties, proves that they were to be the evidence of the contract, not that there was an absolute sale before. A chattel may be sold by *parol*, but if the parties agree that the contract shall be in writing, then the writing is essential to the consummation of the contract. If there was an absolute sale, without any precedent condition, there would have been no necessity to defer the execution of the writings. It is evident, that the defendant was to take the negro upon trial, and if he liked him, then there was to be a sale, otherwise not.

2. As to the bailment. It was a bailment for the benefit of both parties. It was enough that the defendant took the same care of the slave, as a prudent would do of his own property. His permitting the slave, at his request, to go out in the evening, was not such an act of neglect as to make him responsible. He was not bound to keep him locked up, or to set a guard over him.

NEW-YORK,
May, 1807.
DE FONCLEAN
V.
SHEPHERD
JUR.

Again, the sale, if actually made, would be void for the fraudulent concealment of the fact, that the slave intended to run away.

The evidence stated to be discovered since the trial, could not have varied the opinion of the jury; but the application on that ground, is too late; it ought to have been made at the next term after it was discovered.

SPENCER, J., delivered the opinion of the court. Notwithstanding several points were made on the argument, there is really but one: Was the property of the negro, at the time he ran away or subsequently, in the plaintiff or defendant?

*We need not go to the civil law to learn when a chattel is sold, and, fortunately for mankind, it is not a subject of very deep learning in our own law.

[* 174]

Independently of the statute, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel. To avoid frauds and perjuries, the statute requires either that the possession shall pass, or that something shall be given in earnest to bind the bargain, or that some note or memorandum, in writing, of the bargain be signed by the parties or their agents, where the price of the goods and merchandise shall be of the value or exceed 10*l*.

The negro was in the possession of the defendant, but whether as being sold to him, or put into his possession until he should signify his assent to buy, or return him, will depend on the facts in the case. It is not necessary to go minutely into the evidence; there is no positive testimony that the sale was completed. The plaintiff rests on circumstances from which to infer the fact; these the defendant has rebutted by circumstances and by positive proof of the acknowledgment of the plaintiff, that the negro was his when he ran away. I cannot see that the jury have decided against the weight of evidence, by finding for the defendant; and I am, therefore, unwilling to disturb the verdict.

It has been contended that the defendant, as bailee of the negro, is responsible for the running away, by permitting him to go a half a mile from his house in the evening. I cannot consider this position as law. It is unreasonable to suppose that a person would be inclined to buy a negro, or to have any

NEW-YORK,
May, 1808.

WILSON and
GIBBS
v.
REED.

[* 175]

concern with one for his own use, who was to be kept constantly under his eye. There is no negligence in suffering the slave to go out on an errand. The charge of the judge has been complained of, but, in my judgment, *he submitted the cause on its true merits. The affidavit which has been submitted, to show the discovery of new evidence, does not entitle the plaintiff to a new trial, because, had it been before the jury, there is no reason to believe that the result would have been different.

We are, therefore, of opinion, that the plaintiff ought to take nothing by his motion.

Rule refused.

WILSON and GIBBS against EP. REED.

A. and B. being joint owners of a hogshead of rum, the sheriff, by virtue of an execution against B., seized the rum, and sold the whole to C., who sold it by retail. In an action of *trover* brought by A. against C. for his share of the rum, it was held, that if one tenant in common of a chattel sell it, an action of *trover* will lie against him by the other co-tenant; (a) that the sheriff was no trespasser, and that a release of all actions to him by the plaintiff, was no bar to an action against others.

[* 176]

THIS was an action of *trover*. The cause was tried at the last circuit, in the county of *Greene*, before Mr. Chief Justice *Kent*.

From the evidence given at the trial, it appeared that in the spring of 1804, the plaintiffs were in possession of a store-house at *Coxsackie*, at which time the sheriff of *Greene* entered, and by virtue of an execution issued out of the Court of Chancery against the goods of one *Israel Gibbs*, seized a hogshead of rum and a pair of scale-beams which were in the store, in the possession of the plaintiffs, and which were purchased by the defendant at the sheriff's sale. The articles were delivered by the sheriff to the defendant, who took them away. The plaintiffs claimed the articles as their property, and forbade the sale and removal of them. Much of the evidence produced at the trial and detailed in the case, related to the property in the goods; but from the weight of evidence, as well as from the admissions of the counsel, it appeared that the plaintiffs were jointly interested with *Israel Gibbs* in the property; two fifths belonging to the latter, and three fifths to the plaintiffs.

The defendant offered in evidence a release dated the 5th *September*, 1805, from the plaintiffs to the sheriff who seized the goods, of all right of action against him for taking them, but expressly reserving their right of action *against any other person or persons, which was not to be impaired by such release of the sheriff. This evidence was objected to by the plaintiff's counsel, but admitted by the judge, who intimated an opinion that it was a bar to this action, but reserved the question. The judge charged the jury, that the sheriff had no right to sell any

(a) *St. John v. Standing*, 2 *Johns*. 488. *Shelden v. Skinner*, 4 *Wend* 525. *Hyde v. Stone*, 9 *Cow Rep.* 230. See *Mersereau v. Norton*, 15 *Johns*. 179.

more of the property, than the share of *Israel Gibbs*, which, from the evidence, he considered to be two fifths; and that the plaintiffs were entitled to recover for the remaining three fifths, as the presumption was that the rum had been retailed by the defendant, which in law was a destruction, so as to enable one tenant in common to maintain an action against his co-tenant; but as to the scale-beams there had been no destruction. The jury found a verdict for the plaintiffs, for 80 dollars, being three fifths of the value of the rum, and the interest.

NEW-YORK,
May, 1808

WILSON and
GIBBS
v.
REED.

On a motion made by the defendant for a new trial, the following points were raised for the consideration of the court:

1. That by the sheriff's sale, the defendant acquired a title to the whole property.
2. That one tenant in common cannot maintain *trover* against his co-tenant.
3. That if *trover* will lie in case of a destruction of the chattel, yet there was no evidence of a destruction.
4. That the release of the plaintiffs to the sheriff was admissible evidence, and a bar to this action.

Van Beuren, for the defendant. 1. The general principle is too well settled to be denied, that one tenant in common cannot maintain *trover* against his co-tenant, for the possession of one is the possession of all. It is true, that if one tenant in common destroy the thing held in common, *trover* will lie against him by his co-tenant. (*Co. Litt.* 200. *a.*) But the cases in which an action will lie, are those in which the acts are *tortious*, and produce a destruction of the thing. There was no evidence that the rum was sold, or converted by the defendant to his own use, before the action was brought. The witness said only, that it was sold *by the defendant at the time of the trial. A sale by one tenant in common does not sever the tenancy in common. The vendee becomes vested with all the right of the vendor. One partner has a right to sell or assign all the co-partnership property. (*Cowp.* 445. 1 *Burr.* 22.) The sheriff's sale was in the nature of an assignment, and the defendant became a co-partner, and as such had a right to sell the rum. (See 3 *Caines*, 166. 2 *John.* 468. 1 *East.* 363. 1 *Salk.* 398. 1 *Term.* 658.)

[* 177]

2. It was not necessary to plead the release. The only plea in *trover* is not guilty, under which every matter of defence may be given in evidence. The case of *Devoe v. Coridon*, (1 *Keb.* 305.) that a release is to be specially pleaded, is a mere *dictum*. Taking wine for *prisage* is said by Lord *Holt* (*Salk.* 654.) to be the only good special plea in *trover*, to be found in the books. Though some things have been allowed to be pleaded specially in *trover*, it does not follow that it was necessary to plead them, nor that they might not have been given in evidence under the general issue. Then was this release a bar to the present action? The plaintiffs acquit the

NEW-YORK,
May, 1808.
WILSON and
GIBBS
v.
REED.

sheriff of all actions or right of action against him on account of his taking the goods in question, and selling them under the execution. This is, in substance and effect, a release of all their right or claim to the goods. The proviso that the release shall not destroy their right of action against other persons, must be considered as void. If there be a release to one obligee, provided that the other shall not take advantage of it, such a proviso is void. (*Litt. Rep.* 191. *Bac. Ab. Release*, L.)

E. Williams and *Kirtland*, contra. The reason of the rule laid down in *Co. Litt.* that one tenant in common cannot maintain *trover* against his co-tenant is, that the possession of one being the possession of both, the one who is deprived of the actual possession must seek his time to get possession again. While it is in his power thus to regain his possession, no action will lie; but if the property be put beyond his reach, so that he cannot again take possession, he may then bring his action. By the sale of the sheriff to the defendant, he became a co-tenant, not a *partner*. *No man can be made the partner of another, but by his own consent.

[* 178]

Every co-tenant is not a partner, nor entitled to the rights of a partner. Here the rum had been retailed out by the defendant, and it was impossible for the plaintiff to take possession of it again. They had, then, no other remedy but this action.

The release, if it amount to any thing, is a release of the sheriff as a co-trespasser with the defendant. But the sheriff was not a trespasser. The plaintiffs had no right of action against him to release. Again, no consideration is mentioned in the release, and there is an express stipulation that it shall not impair or defeat the plaintiff's right against others: And a release being a discharge by deed, must always be pleaded. (*Esp. Dig.* 241. *Dyer*, 28. 1 *Viner*, 260. 1 *Keble*, 305.)

SPENCER, J., delivered the opinion of the court. The counsel for the plaintiffs, on the argument, very properly gave up the point that *Israel Gibbs* was not interested in the goods seized by the sheriff, in two fifth parts, for the evidence is conclusive that he was owner to that extent.

The only remaining questions are, 1. Whether an action of *trover* and *conversion* will lie by one tenant in common against his co-tenant in common for the sale of the chattel owned by them.

2. Whether the defendant has been guilty of a *trover* and *conversion* of the rum before the action brought.

3. Whether the release to the sheriff will avail the defendant.

That an action of *trover* will lie by one tenant in common against another for a destruction of the chattel, or for its loss, whilst under his management, has not been controverted; but a distinction has been attempted between a sale of the chat

and a *tortious* destruction, a distinction, I think, not maintainable. Tenants in common of a chattel have each an equal right to the possession, and the law will not afford an action to the one dispossessed, because his right is not superior to that of the possessor; *but tenants in common are not like partners; the latter may dispose of chattels, by virtue of an implied authority to sell, without being liable as for a *tort*, whilst the former cannot dispose of them without violating the right of their co-tenants; for a sale, therefore, of a chattel, an action of *trover* will lie by one tenant in common against another.

2. The fact, whether a sale of the rum had taken place when the action was brought, was a point submitted to the jury, and the case does not present the dates of the transactions, so as to enable me to say that the jury have mistaken the facts.

3. The release to the sheriff cannot protect the defendant, because in fact he was not a trespasser, by selling the interest of *Israel Gibbs* in the rum; and the release itself manifestly shows that there has been no actual satisfaction to the plaintiffs; it was given long after the action brought, and I think it was improper evidence, had its operation been more extensive than it is.

The court are, therefore, of opinion, that the defendant must take nothing by his motion.

VAN NESS, J., not having heard the argument, gave no opinion.

Rule refused.(a)

(a) The case of *Wilson & Gibbs v. Ab. Reed*, depending on the same questions, was decided in the same manner.

NEW-YORK
May, 1808.

JARVIS
v.
HATHEWAY
[* 179]

*JARVIS against HATHEWAY.

[* 180]

THIS was an action of *slander*. The cause was tried before Mr. Justice Thompson, at the *Oneida* circuit, on the 8th of June, 1807.

On the trial, the plaintiff proved, that the defendant, in the presence and hearing of C. and D., addressing himself to the plaintiff, said, "You are guilty of forgery," and, as stated by a second witness, "You are guilty of absolute forgery;" which were the words charged in the declaration.

If words, actionable in themselves, be spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to de-

cide whether there be malice or not. (a) In actions of a penal or vindictive nature, the court will not grant a new trial merely because the verdict is against the weight of evidence, unless some rule of law has been violated. (b)

(a) *Sewall v. Catlin*, 3 Wend. Rep. 294.

(b) *Sargent v. —*, 5 Cons. Rep. 106. *Murphy v. The People*, 2 Cow. Rep. 815

NEW-YORK,
May, 1808.

JARVIS
v.
HATHEWAY.

On the cross-examination of the witnesses, it appeared, that the words were spoken at a meeting of the parties, before the witnesses, C. and D., who were two members of the same church to which the parties belonged, and were convened for the express purpose of taking "*the second step of labor in church discipline*, and were with the parties alone, and acting *under the rules of the church*, and in pursuance of the precept or rule contained in the 18th chapter of the evangelist *Matthew*," which was set forth by the defendant in his notice, annexed to the plea in the cause, to which plea was also annexed a notice of justification of the truth of the charge in the declaration. The defendant called no witness.

The judge charged the jury, that the words proved to have been spoken by the defendant, were of themselves actionable, but that they ought to be satisfied that they were spoken maliciously, or with a defamatory intent; that the circumstances under which the charge was made against the plaintiff, were proper to be taken into consideration, to determine the intention with which it was made. If it was made in the regular course of church discipline, and with an honest intention of examining whether the plaintiff was a fit member of the church, he was not, in his opinion, entitled to recover: But if the charge was unfounded, and made with an intention of injuring the feelings and reputation of the plaintiff, the *circumstances under which it was made, was an aggravation of the slander. The jury found a verdict for the defendant.

[* 181]

A motion was made by the plaintiff to set aside the verdict, and for a new trial;

1. For the misdirection of the judge.
2. Because the verdict was against evidence

Gold, for the plaintiff. The words charged in the declaration, and proved, were absolute and unqualified. No probable cause or justification, as to the truth of them, was offered or shown by the defendant. The offence charged against the plaintiff was not a breach of any of the duties of imperfect obligation, but a crime for which the laws have provided a very severe punishment. Courts of justice ought not to countenance ecclesiastical assemblies in taking cognizance of such offences, and by thus hushing them up, to prevent that due course of justice by which the party might be effectually restrained from a repetition of the crime. Where a person exhibits an accusation against another, in the ordinary course of justice, before a court having jurisdiction of the offence charged, no doubt an action will not lie; but if the offence is not examinable before such tribunal, the party may have his action. Thus in the case of *Buckley v. Wood*, it was decided, that where the defendant exhibited articles before the Court of Star Chamber, against the plaintiff, charging him with matters properly cog

nizable there, and also with murder and piracy, which were not examinable in that court, an action of slander would lie; for as that court had no jurisdiction of murder or piracy, the bill was not a proceeding in a court of justice. (4 Co. 14. See also *Bac. Ab. Slander*, E.) In the present case, there was no formal complaint or allegation, no specific circumstances stated, which could enable the plaintiff to meet or repel the charge. No process was issued, nor was the matter brought before any court known to our laws, or possessing a legal jurisdiction.

NEW-YORK,
May, 1808.
JARVIS
V.
HATHWAY

**Hatheway*, contra. In cases of this kind, the occasion of speaking the slanderous words, or the circumstances under which they are published, is always to be taken into consideration; and if there be clearly no malice, the jury may find for the defendant. They are the proper judges of the intent. For words published in the course of seeking a redress for grievances, before the proper persons to afford redress, no action lies. As where the deputy governor of *Greenwich Hospital*, in a book giving an account of the abuses of the hospital, reflected on Lord *Sandwich*, one of the officers, with great asperity, it was held that it was no libel. (*Esp. Dig.* 506.) Nor will an action lie for words, spoken conscientiously, or in confidence, without any malice, or evil intent. (*Buller's N. P.* 8, 9, 10. 1 *Wm. Black.* 386.) [The counsel was here stopped by the court.]

[* 182]

Gold, in reply. It is true, that for censure or words published by a member of a society, or sect, in relation to their rules and ordinances, and which relate merely to discipline, no action will lie; but this extends only to matters properly cognizable before such society, and in which the members only are concerned; not to crimes in which the whole community are interested. In all the cases cited, there was some good end, some purpose of morality or justice to be answered. But suppose the deputy governor of *Greenwich Hospital* had published that Lord *Sandwich* had been guilty of murder, would this not have been considered as malicious, and a libel? The jury, no doubt, are to decide whether there be malice or not; but unless they decide according to evidence, or there be proof that there was no malicious intent, their verdict ought not to stand.

SPENCER, J., delivered the opinion of the court. The plaintiff's counsel have considered the charge of the judge as incorrect, in leaving it to the jury to decide whether the words spoken, which were actionable in themselves, were spoken maliciously, or with a defamatory intention.

I am perfectly satisfied, that the charge to the jury was not only correct, but that no other charge could have *been legally given. It is manifest, from the case, that the words were

NEW-YORK,
May, 1808.

Administrators
of DUMOND
v.
CARPENTER.

uttered in the course of church discipline, by the defendant to the plaintiff, who were both church members; and whether such discipline was proper or not, is not a point for us to determine. Every sect of Christians are at liberty to adopt such proceedings for their regulation as they see fit, not inconsistent with law, or injurious to the rights of others. In actions of slander, it is of the essence of the action, that the words be spoken maliciously, and that, as a matter of fact, belongs to the jury to determine.

If, however, the weight of evidence was against the defendant, as to the maliciousness of the words, it would be violating a salutary rule to grant a new trial. In penal actions, in actions for a libel and for defamation, and other actions vindictive in their nature, unless some rule of law be violated, in the admission or rejection of evidence, (1 *Burr.* 54. 2 *Salk.* 644—8.) or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success.

We are, therefore, of opinion, that the motion for a new trial must be denied.

Rule refused.

The Administrators of DUMOND against CARPENTER.

There is a person
called the
administrator of an
estate, and ap-
pears to his
own use, an
action can im-
pliedly be brought
will be against
him, by the per-
son to whom he

[* 184]
money ought to
have been paid.
Where a term
intervenes be-
tween the test-
and return of a
writ of inquiry,
which is a mis-
continuance, it
is cured by
the statute of
repeals (a)

THIS cause came before the court, on a writ of error from the Ulster Court of Common Pleas.

It appeared from the record that *Carpenter* declared against the administrators of *Dumond*, stating that the intestate, on the 1st *January*, 1784, was indebted to him in the sum of 200 dollars, for that the intestate was at the time sheriff of *Ulster*, and as such levied and received the amount of an execution against *James M. Masters*, at the suit of the plaintiff, issued out of the Court of Common Pleas of the county of *Ulster*, and converted the same to his own use, and being so indebted, assumed to pay to the plaintiff the said sum of 200 dollars. The second count was for money had and received by the intestate.

The defendant appeared to the first *Tuesday* in *May*, and then made default, on which an interlocutory judgment was entered, and a writ of inquiry awarded, returnable on the third *Tuesday* in *September*, and on that day the sheriff returned an inquisition assessing the damages at 170 dollars, 80 cents, on which final judgment was entered.

The counsel for the plaintiffs in error relied upon two objections arising upon the record in the above cause.

(a) *Miller v. Plumb*, 6 *Cow. Rep.* 63b

1. That the declaration in *assumpsit* was bad, as the money was *tortiously* applied by *Dumond* to his own use.

2. That there was a discontinuance, as the award of a writ of inquiry is made as of *May* term, returnable in *September* term, omitting the term of *July*.

NEW-YORK,
May, 1808.

Executors of
SMEDES
v.
ELMENDORF

L. Elmendorf, for the plaintiff in error.

Sudam, contra.

Per Curiam. The answer to the first objection is, that the first count in the declaration is good in *assumpsit*, for the law will, and always does raise an *assumpsit* from the misapplication of money received to the use of another.

The answer to the second objection is, that if a term intervene between the *teste* and return of a writ of inquiry, it creates no prejudice to the party, and is, at any rate, only a discontinuance, which is *cured* by the statute of *jeofails*. (*Sayer*, 245.)

The judgment must be affirmed.

*The Executors of SMEDES against ELMENDORF.

[* 185]

THIS was an *action on the case* against the defendant for negligence as an attorney. The cause was tried before Mr. Justice *Spencer*, at the last *Ulster* circuit.

The declaration stated, that the testator, on the 31st day of *January*, 1795, delivered to the defendant a promissory note, dated the 10th *May*, 1795, for 35*l*. (equal to 87 dollars and 50 cents,) made by one *Lewis Hardenbergh*, jun., payable to the testator, to be collected by the defendant as an attorney; that, during two years from and after the 31st *January*, 1795, the said *Hardenbergh* was frequently in the state of *New-York*, and amenable to process, which was known to the defendant, and that he was solvent, and able to pay the note; and that the defendant, &c. The defendant pleaded the general issue.

At the trial, the plaintiffs produced a receipt in the following words:—

“Received, 31st *January*, 1795, a note of hand, commonly called a promissory note, for 35*l*. dated 10th *May*, 1794, given by *Lewis Hardenbergh*, jun. to *Peter Smedes*.

“*Cd. Ed. Elmendorf*.”

Where an attorney gave a receipt for a promissory note without expressing the purpose for which he received it, it was held, that the presumption was, that he received it to be collected, and that this presumption, confirmed also by other circumstances, was sufficient evidence to support an action against him, by the payee of the note, for his neglect in suing the maker, who afterwards became insolvent.

[The note was payable on demand, and no interest expressed.]

145

NEW-YORK,
May, 1808.
Executors of
SMEDES
v.
ELMENDORF

[* 186]

It was proved, that while this suit was pending, and before the trial, the defendant said that he had in hands a note in favor of *Peter Smedes*, against *L. Hardenbergh*, who had moved away and become insolvent, and that he could not get the money; but whether he said that he had received it to collect, or that the executors alleged that he had so received it, the witness was not certain. It appeared, that *Hardenbergh* moved to the state of *New-Jersey*, in *May* or *June*, 1794, where he resided until his death in 1796; that he was in the county of *Ulster*, for about three weeks, in the winter of 1795, and was seen within eight miles of *Kingston*, where the defendant resides; that he was again in *Ulster* county, in the winter of 1796, and again in *May* or *June* of the same year. It was proved, that *Hardenbergh* *was one day in *Kingston* in the winter of 1795, but that he was principally, while in *Ulster* county, during that winter, at *New Paltz*, about 13 miles from *Kingston*. The plaintiff also produced in evidence, a receipt given by the defendant to *Hardenbergh*, dated the 5th *February*, 1796, for certain bonds and notes to collect, and it was proved, that the defendant was the agent of *Hardenbergh* after he removed to *New-Jersey*.

The defendant then moved for a nonsuit, but the motion was overruled by the judge.

The defendant proved, that in *August*, 1795; one *Brush* was the agent of *Hardenbergh*, and that, in 1794, one *Dewitt* had a power of attorney from him.

The defendant further proved, that it was the usual practice of the defendant, in his business, to enter the cause in his register, as soon as a note was received for collection; that no cause was entered in the present case, and that it was usual, when a receipt was given for a note intended to be left for collection, to express in the receipt that it was to be collected. It appeared that the testator had lost money by *Hardenbergh*, and that he did not know that the defendant was his agent.

The judge charged the jury, that from the receipt given by the defendant, it was to be presumed, that the note was left for collection; but that circumstances might explain for what purpose it was received; and that the jury might presume that it was left for collection; that the receipt given by the defendant to *Hardenbergh* in 1796, was proof that he had seen *Hardenbergh* at that time; that interest was to be calculated on the note from the time of the plaintiff's neglect. The jury found a verdict for the plaintiff, for the principal of the note, with interest from its date.

The defendant moved to set aside the verdict, and for a new trial;

1. Because the evidence did not support the declaration:
2. Because the judge misdirected the jury:
3. Because the verdict was against evidence.

Sudam, for the defendant. The receipt given by the defendant does not express any agency. It does not follow, *from the profession of an attorney, that he is to prosecute and collect a note left in his hands, nor does that circumstance afford *prima facie* evidence that the defendant undertook to collect the note which was left with him. The defendant is not answerable beyond the terms of his receipt; and there was no parol evidence to show any special agency, or undertaking on his part. Had he issued process, and neglected to prosecute the suit effectually, there would then have been some ground to have presumed his undertaking to collect the note.

NEW-YORK,
May, 1808.

Executors of
SMEDES
V.
ELMENDORF
[* 187]

Hawkins, contra, contended, that if a note be left with an attorney, in the usual course of business, it affords a strong presumption, that it was for the purpose of being collected by legal means. As, if cloth be left with a tailor, it is presumed that it is to be made into a garment.

SPENCER, J., delivered the opinion of the court. On the motion to set aside the verdict in this cause, the defendant's counsel has insisted,

1. That the charge of the judge to the jury was incorrect, in stating that the receipt for the note created a presumption, that the note itself was lodged with the defendant for collection.

2. That the verdict was against the weight of evidence, as to any neglect on the part of the defendant in collecting the note, and as to its being left with him for collection.

1. That an attorney is responsible for negligence of the trust reposed in him by a client, has not been questioned. The plaintiff's claim in this case is, that he placed a note in the hands of the defendant against *Lewis Hardenbergh, jun.*, for collection; that *Hardenbergh* was solvent and liable to arrest, and that by his subsequent death and insolvency the debt is lost, through the defendant's culpable negligence.

The receipt is in general terms for a note, the date and amount of which is expressed. It seems to me to be a proposition which cannot be doubted, that when an attorney, whose office and business it is to prosecute and collect notes and other demands, gives a general receipt for the evidence of a debt then due, that it must be presumed, **prima facie*, that he received it in his capacity of attorney, for the purpose of collection, and that it is incumbent on him to show that he received it specially, and for some other purpose, if he would avoid the consequences resulting from such general intentment.

[* 188]

Upon the fullest reflection, and reconsideration of this point, I think that the opinion I delivered to the jury was correct. To fortify the presumption arising from the receipt, the de-

NEW-YORK,
May, 1808.

Executors of
SMEDES
v.
ELMENDORF.

defendant's conversation with one *Helm*, was given in evidence, in which the defendant stated, that he had a note *in hands* for *Smedes* against *Hardenbergh*, and that he had received the note for collection, or that the executors said he had so received it; the witness was inclined to believe, that the defendant said he had received it for collection. It is true that a suit was then pending against the defendant, for his neglect of duty in relation to this note, and it is improbable that he would admit away his cause; but the manner of his receiving the note was not the only point to arise; it was essential also to prove his neglect. The expression made use of by the defendant, that he had a note *in hands* for *Smedes* against *Hardenbergh*, is a very significant one, and undoubtedly fairly imported that he had it in his professional character. The evidence arising from the defendant's not entering the cause in his register, and that the usual form of receipts for notes expressed their being left for collection, does not sufficiently rebut the presumption already mentioned, and the declarations of the defendant. The non-entry of the cause has, most probably, occasioned the neglect of issuing process, and the general form of receipts by no means proves that there were no exceptions. I still think that the purpose for which the defendant received the note, is almost irresistibly to be inferred from the receipt, from his being an attorney, and from his giving no account of its having been left with him for any other purpose.

[* 189]

2. Was the neglect of duty made out by the evidence? It appears to me that the receipt of the 6th of *February*, 1796, to *Hardenbergh* for bonds and notes to collect, in the handwriting *of the defendant, and purporting that they were received from *Hardenbergh*, taken in connection with the fact, that at that period he went to *Kingston*, and that the defendant was his agent, shows satisfactorily, that the defendant saw *Hardenbergh*, and knew that he was then liable to process, and establishes a culpable neglect in not issuing a writ against him.

The declarations of *Smedes*, that he had lost money by *Hardenbergh*, were left to the jury, with such observations as I then thought, and still think, proper. If they applied to this note, they would not have the influence which has been supposed; he might have been ignorant of his right against the defendant, or ignorant of the fact, that the defendant had been culpable.

The court are of opinion, that the verdict was warranted by the evidence, and that a new trial ought not to be granted.

Rule refused.

NEW-YORK,
May, 1808.J. LIVINGSTON *against* The Executors of W. LIVINGSTON, deceased.LIVINGSTON
v.
Executors of
LIVINGSTON.

THIS was an action of *assumpsit*. The first count in the declaration stated, that *Robert Livingston*, deceased, late proprietor of the manor of *Livingston*, died seised of a large real and personal estate, and being so seised, in his life-time, did, on the 31st of *May*, 1784, *by will*, devise largely to his five sons, of whom *John* and *Walter* were two, and reciting, that as he had advanced to his son *Walter* 4,000 pounds more than to his other three sons, he did order, that the two devises to him were upon the further consideration, that he, his heirs, executors and administrators, pay to his three sons named, 3,000 pounds, &c., within two years, &c. That he died on the 28th of *November*, 1790; that *Walter Livingston* *assented to the devises, and entered and became seised of an equal fourth part of the lands devised to the four sons, *John*, *Robert*, *Walter* and *Henry*, subject to the payment of his proportion of the quit-rents, and subject to the payment of an annuity mentioned to *Gertruyd Livingston*, and subject to the payment of 3,000 pounds mentioned, to *Robert*, *John* and *Henry*, each one third thereof, within two years after the testator's death; by reason whereof, the said *Walter* became liable to pay to the plaintiff, within two years, &c., 1,000 pounds; and being so liable, he, in consideration thereof, assumed, &c.

There were other counts, for *work* and *labor* and *services*, and a *quantum meruit* thereon; for goods sold and delivered, and a *quantum valebant*, and for money lent, money paid, laid out and expended, and money had and received to the use of the plaintiff.

An interlocutory judgment, for want of a plea, was entered, and damages assessed separately on each count. A motion was made by the defendant, in arrest of judgment, for the following reasons:—

1. Because, by reason of the matters in the first count, the said *Walter Livingston*, in his life-time, was not liable to be sued at law, he being only a trustee for the sum so bequeathed, and the plaintiff's remedy being in equity.
2. Because the plaintiff does not aver that the defendants are the *tertenants* of the lands so devised and described, &c.
3. Because the plaintiff does not aver that the defendants, as executors, had assets sufficient, &c.
4. Because the defendants, as executors, cannot be sued at law for the matters contained in the first count.

Henry, for the defendants. This is an action for a legacy

Where land is devised, subject to the payment of a specific sum of money, as a legacy, no action will lie against the personal representatives of the devisee; but it must be brought against the heirs and terienants. (a) Where there were several

[* 190] counts in a declaration, and after interlocutory judgment, damages were separately assessed upon each, and judgment was arrested on the first count, no objection being made to the others, the plaintiff was allowed to enter a *nolle prosequi* on the first count, and take judgment on the others.

(a) See *Pelletreau v. Rathbone*, 18 *Johns.* 423, and the reporter's note (a).

NEW-YORK,
May, 1808.

LIVINGSTON
v.
Executors of
LIVINGSTON.

[* 191]

No action at common law will lie against executors or administrators for a legacy, except upon an express promise to pay. (1 *Sid.* 45. *Cowp.* 284. 1 *H. Black.* 109. 5 *Term.* 690. *Peake's N. P.* 73.) The statute has provided, that an action may be brought after a demand and offer of sureties, to be approved of by the court. (*Rev. Laws*, vol. 1. p. 540.) The action *ought to have been brought against the devisees or tertenants, they being in possession of the fund out of which it was to be paid.

E. Williams, contra. By taking the property out of which the money was to be paid to the plaintiff, there is a consideration and an implied promise to pay the money as directed by the will. It is not precisely the case of a legacy, payable out of a personal fund. This sum of money became a debt, due by *Walter Livingston* to the plaintiff, and, being a debt or personal duty, it devolved on his representatives, who ought to pay it; and there is an averment in the declaration that there were assets more than enough to pay all debts. The payment of the money is not expressly charged on the land; but the land is devised to *Walter Livingston*, in consideration of which he is ordered to pay so much money to the plaintiff. The statute certainly meant to provide for the payment of legacies by executors and administrators, by giving an action against them in any court of record. If, however, the court should think that the judgment on the first count must be arrested, still there are other counts, and the damages having been separately assessed, the plaintiff ought to be allowed to enter a *nolle prosequi* on the first count, and take judgment on the others.

Henry, in reply. This is a bequest of money charged on land, and if it is not a legacy, it is a nondescript. By entering on the land, *Walter Livingston* became liable only as devisee. No personal duty was created, nor did any devolve on his personal representatives. The land remains charged with the payment of the money, and the action ought to be brought against the heirs and tertenants of *Walter Livingston*. It is in the nature of a trust, and is properly cognizable in the Court of Chancery. That court can impose terms agreeable to equity and justice. As suppose a legacy to a wife, the husband might be compelled to make provision for her; whereas, in a court of law, *he would get the money into his own hands, without any control. There is, therefore, very strong reasons why an action should not be maintained in a court of law, for a legacy.

[* 192]

KENT, Ch. J., delivered the opinion of the court. The 3,000 pounds directed to be paid by *Walter Livingston* to his brothers, was a charge upon the real estate. The two devises to him were in consideration that he paid that sum. The legatees

were, perhaps, entitled to have sued him at law as a tertenant, according to a decision of the Court of Errors in 1790. He was chargeable only as devisee or tertenant. It was not a personal duty, and, of course, none descended to his personal representatives. His heirs are the only persons chargeable at law, as tertenants or owners of the land. There is no ground whatever to raise an implied *assumpsit* from the devise itself. The first count in the declaration is, therefore, erroneous.

But as there are other counts in the declaration, to which no objection is made, and as the damages were assessed separately on each count, the plaintiff has leave, according to his suggestion, to enter a *nolle prosequi* on the first count, and take judgment on the others.

VAN NESS, J., having been formerly concerned as counsel in the cause, gave no opinion.

Judgment for the plaintiff.

NEW YORK,
May, 1808.
Overseers of
WASHINGTON
v.
Overseers of
STANFORD.

*THE OVERSEERS OF THE POOR OF THE TOWN OF WASHINGTON *against* THE OVERSEERS OF THE POOR OF THE TOWN OF STANFORD. [* 193]

THIS cause came before the court on an appeal from an order of the General Sessions of the Peace of *Dutchess* county.

It appeared that one *Huddleston* and his wife, and four infant children, were removed, as *paupers*, from the town of *Stanford* to the town of *Washington*, by an order of two justices, dated the 18th of *December*, 1806, which stated that the paupers had become chargeable to the town of *Stanford*, and had not gained any legal settlement therein, and they adjudged their legal settlement to be in the town of *Washington*. Previous to this order, the paupers had been removed to the town of *Stanford*, by an order of two justices of *Ulster* county, dated the 31st day of *October*, 1806, adjudging that to be the town from which they had last come, and that they had gained no settlement in the town of *Wawasink*, from which they were removed. From the last order there was no appeal made. The towns of *Washington* and *Stanford* were formerly one town, by the name of *Washington*. By an act of the 12th of *March*, 1793, the town of *Washington* was divided, and a part thereof erected into a new town, by the name of *Stanford*, and the poor of the former town were divided, according to the act, between *Washington* and *Stanford*. *Huddleston* was born in *Washington*, before it was divided, and in that part of it in-

Where a town is divided by an act of the legislature into two towns, and the poor are also directed to be divided between the two, those who afterwards become paupers, are to be considered as settled in the towns within which they were respectively born, and not where they happened to reside at the time of the division. (a)

(a) See *Overseers of Hudson v. Overseers of Tagkanac*, 13 Johns. 247, 248.

NEW-YORK,
May, 1808.

Overseers of
WASHINGTON
v.

Overseers of
STANFORD.

* 194]

cluded in the present town of *Washington*. At the time the town was divided, he *resided* in that part of it now called *Stanford*, but was not then chargeable.

On an appeal to the General Sessions of the Peace of *Dutchess* county from the first mentioned order, the court decided, that with respect to the settlement of the pauper, *the towns of *Washington* and *Stanford* must be considered as if they had always been separate, and that he must, therefore, be deemed chargeable to the town of *Washington*, having been born in that part of the old town now called *Washington*, and the order was affirmed.

Proof was offered to the sessions, that at the time of the division of the town, the supervisors and overseers of those two towns agreed, that each town should support all such persons as were then inhabitants of each town, and who should thereafter become chargeable, but this testimony was overruled.

From the judgment of affirmance, the overseers of the poor of *Washington* appealed to this court.

Emott, for the plaintiffs in error. The general law relative to the poor, does not apply to this case. The question is not the same, as if it arose between either of the two towns and a third town. It depends on the true construction of the act of 1793, for dividing the town of *Washington*, and erecting a part of it into a new town by the name of *Stanford*. The poor of the old town, that is, the paupers with which *Washington* was, before the division, chargeable, were directed to be divided, and each town was to maintain the poor residing within its limits respectively. Persons that afterwards became paupers, would be provided for by the general law relative to the settlement of the poor. The agreement made between the supervisors of the two towns, shows that such was their construction of the act, and it ought to have been received in evidence. If this case does not, by this construction, come within the act of 1793, it must then be decided according to the common law, which knows of no *settlement* but by *residence*. The other modes of gaining a settlement are derived from the statutes.

J. Tallmadge, contra. The supervisors had no power to make any agreement relative to the poor, different from the provisions of the statute; nor can their agreement be binding on the town, or be evidence of the true construction of the act of 1793. The place of *birth* is *always considered as the place of settlement, and when it was proved that *Huddleston* was born within the present town of *Washington*, that was sufficient to fix his legal settlement there, unless the plaintiffs in error could show a derivative settlement elsewhere.

VAN NEEs, J. The only question in the case is, whether the

town of *Stanford*, in *Washington*, is chargeable with the maintenance of *John Huddlestone*, who became a pauper on the 18th of *December*, 1806? To determine this, it is necessary to inquire which of the towns is the last place of his legal settlement.

NEW-YORK,
May, 1808.
Overseers of
WASHINGTON
v.
Overseers of
St

The town of *Washington* was divided in 1793, and that part of it which is now the town of *Stanford*, was erected into a separate town. The pauper was *born* in the territory now composing the present town of *Washington*, but at the time when the town of *Washington* was divided, under the act for the dividing the town of *Washington*, he *resided* in the territory which now composes the town of *Stanford*.

When a new town is erected, it immediately becomes entitled to all the benefits and advantages, and subject to all the duties and burthens common to other towns. Among the latter is the burthen of maintaining the poor. The provisions of the general law for the maintenance and relief of the poor attach on the new town, the moment it is erected. This being granted, it seems to me to put an end to the question now under consideration.

That birth gives a settlement is not to be disputed, as a general rule; indeed, this is assumed as a fixed principle by our statute. *Huddlestone*, who became a *pauper* in 1806, was chargeable, therefore, to the town in which he was born, which is the present town of *Washington*, unless he has obtained a legal settlement elsewhere.

It is not pretended that he has gained such settlement, unless his residence within the bounds of the present town of *Stanford*, at the time of the passing of the act to divide the town of *Washington* in 1793, has had that effect. The act provides, that after a division of the poor, each town shall maintain its own poor, that is, after the division, *these towns, in relation to the support of the poor as regulated and defined by the general poor laws, shall stand on the same footing as other towns.

[* 196]

It cannot be supposed that the legislature intended to introduce a new rule, in relation to the settlement of paupers, as between these towns. If such had been their intention, it would have been declared in express terms, and not have been left to mere implication.

There is another view of this question, which appears to be conclusive. Suppose the pauper, in 1806, had resided in the town of *Poughkeepsie*, and it had been necessary to remove him from thence to the town in which he had acquired a legal settlement, I think there can be no doubt, that the town of *Washington* would be considered as the town to which he was chargeable. In the case just supposed, the provisions of the general poor law certainly would have prevailed. If the construction given to the act of 1793 by the appellants' counsel, be correct, it would follow that, as between the towns of *Stan-*

NEW-YORK,
May, 1808.

Overseers of
WASHINGTON
v.
Overseers of
STANFORD.

ford and *Washington*, there would be one rule regulating the settlement of paupers, but as between them and third towns there would be another and a different rule. In the first case, the residence of the party would determine the settlement, and in the other, it would be determined by the birth. I am persuaded that this was never the intention of the legislature. The construction I have adopted will establish one general rule, in the operation of which there is nothing unequal or unjust.

The evidence offered respecting the agreement between the supervisors and overseers of the poor of the towns of *Washington* and *Stanford*, was properly rejected by the sessions. That agreement, if made, was not obligatory, and can never control the operation or construction of a statute.

I am of opinion, therefore, that the order of sessions be affirmed.

[* 197]

SPENCER, J. The town of *Washington*, prior to 1793, composed the present towns of *Washington* and *Stanford*. *By an act of the 12th of *March*, in that year, the latter was erected into a new town; the act dividing it, prescribed a method of equalizing the poor of the original town, and it declared that thereafter the towns should maintain their respective poor. *John Huddlestone*, the pauper, was born in *Washington* prior to its division, and in that part of it which composes the present town of *Washington*, but at the time of the division, he resided in the present town of *Stanford*, and has generally since resided there, but was not chargeable, nor likely to become so. Under these circumstances, which of the towns is bound to support him and his wife and children?

In my opinion, the town of *Washington* is bound to support them as paupers chargeable on that town. After the separation of the town of *Washington*, and the division of the poor according to the act of 1793, with respect to all future paupers, they stood in the same situation in respect to each other, as any other towns in the state, and as though they had always been distinct towns; the requisition of the statute, that after the division of the paupers, the towns should maintain their respective poor, never attached on *Stanford*, because *Huddlestone* had gained no settlement there; but it did attach on *Washington* in consequence of the birth of *Huddlestone* within its bounds. Birth is not one of the means mentioned in the statute of acquiring a settlement; but the statute presupposes, that it gave settlement, and it has accordingly been holden that the town where a pauper is born is chargeable with his maintenance, until he acquires some other settlement.

The sessions very properly overruled the evidence of declarations made, when the poor were distributed; the supervisors and overseers of the poor had no authority to make any agree-

ment relative to future paupers ; and it would be extraordinary to receive it as evidence of their sense of the law.

In my opinion, the order of the sessions must be affirmed, with costs.

NEW-YORK,
May, 1808.

Overseers of
WASHINGTON

v.
Overseers of
STANFORD.

[* 198]

*KENT, Ch. J. Upon the division of a town, the poor are directed to be apportioned, not according to the place of birth, (for they might all happen to have been born in one division of the town,) but according to the last tax list. This was the case with the towns in question, and if *Huddleston*, the principal pauper here, had been at that time a pauper, the place of his birth would have been immaterial as it respected the apportionment of the poor. The more reasonable construction of the law appears then to be, that each town took the responsibility of the maintenance of the inhabitants who fell within its new limits. Actual residence became equivalent to birth, in respect to the settlement of the inhabitants of these towns in relation to each other. The actual spot of the birth formed no rule of apportionment of the existing poor, and why should it, as to any of the then existing inhabitants? In the western and northern parts of the state, one part of a town may have been settled, principally, by emigrations from another part, and by the rule adopted in the court below, upon the separation of the new settlements into a distinct town, all their accruing paupers for many years would be returned upon the old town. The principle adopted by the act, which was not to regard the place of birth in the first distribution of the poor, ought to be carried throughout, and each town should be precluded from recurring back to the place of birth, in the case of actual residents at the time of separation. For these reasons, I am of opinion, that the order below ought to be reversed.

YATES, J., not having heard the argument in the cause, gave no opinion.

Order affirmed.

NEW-YORK,
May, 1808.

JACOBSON

v.

Executors of
LE GRANGE.

*JACOBSON *against* The Executors of LE GRANGE.

Where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived and worked for him above eleven years, and the uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any thing to the nephew, or making him any compensation, it was held, that an action on an implied *assumpsit* would lie against the executors for the work and labor performed by the nephew, for the testator. (a)

THIS was an action for work and labor, and services performed by the plaintiff for the testator. The cause was tried before Mr. Chief Justice *Kent*, at the *Albany* circuit, in *October*, 1807.

On the trial, the following facts were proved. The parents of the plaintiff were about putting him to a trade in 1790, when the testator, who was his uncle, requested them to let him take the plaintiff as his own child, for he would do better for him than his parents could. The plaintiff was then about eighteen years old, and his parents, after some hesitation, consented to let him go and live with his uncle, who said, that at his death he would do by him as his own child. He lived with the testator, and worked for him eleven years and eight months. The plaintiff lived in the testator's family, and was maintained and clothed by him as one of his children. The plaintiff, after he was married, lived about six years in the testator's family, and had two children born in the mean time. It did not appear that the testator had ever promised to pay the plaintiff for his services. It was proved that he said that the plaintiff should be one of his heirs. In a conversation with the mother-in-law of the plaintiff, the testator proposed to purchase a farm for the plaintiff, worth 600*l.*, and that he would pay 350*l.* towards the purchase, saying that would be a fair compensation for the plaintiff's services.

From the evidence offered on the part of the defendants, it appeared that the plaintiff had expressed a desire that the testator should make his will, and after his decease wished to see it; but never mentioned any claim on the testator. The defendants also gave in evidence a promissory note from the plaintiff to the testator for 50 dollars, dated the 13th *May*, 1805. A verdict was taken by *consent, for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

[* 200]

Van Vechten, for the defendant. The only question is, whether the declaration is supported by the evidence. The plaintiff went to live with the testator voluntarily, and on the mere expectation of being made the heir of his uncle. He consented that his remuneration, if any, should depend upon the good will of the testator. This is evident from the testimony of the witnesses, and the whole conduct of the parties. The work and labor, therefore, performed by the plaintiff, must be considered as a voluntary courtesy, and not as creating an implied *assumpsit*, on the part of the testator to pay.

(a) *Livingston v. Ackerton*, 5 *Cov. Rep.* 531. See *Patterson v. Patterson*, 13 *Johns.* 373.

In the case of *Osborne v. The Governors of Guy's Hospital*, (Strange, 28. Bull. N. P. 145.) it was expressly decided, that where a person does business, or performs services for another, under the expectation of being compensated by a legacy, he cannot afterwards resort to an action. *Assumpsit* will not lie on a general promise of a legacy.

NEW-YORK
May, 1808.
JACOBSON
v.
Executors of
LE GRANGE.

Henry, contra. From the evidence in the case, the plaintiff is entitled to an action on the *quantum meruit*. It is enough, *prima facie*, to show labor performed; to raise the implied *assumpsit* to pay for it. The witnesses state, that the testator promised to do by the plaintiff as if he were his own child; that he proposed to purchase a farm, and to pay 350*l.*, which he considered no more than a compensation for his services. It is clear, then, that a compensation was intended, if not promised to the plaintiff. It would be countenancing fraud and deception, if one person were allowed to induce another to perform services for him, by a promise of recompense in his will, and afterwards take no notice of him when he comes to make his will.

The case cited from *Strange* is a *dictum* of Lord Raymond at *nisi prius*. If it were clearly the understanding of the parties that the services should be gratuitous, it is true, no action would lie. But in the present case, the plaintiff went to live with the testator at his request, and *under an encouragement, if not a promise, of compensation.

[* 201]

VAN NESS, J., delivered the opinion of the court. The only question in this cause is, whether the services performed by the plaintiff were rendered with a view to any other compensation than such as the testator should voluntarily make by his last will and testament. This is a mere question of fact, and the defendants having consented that the jury should find for the plaintiff, it is difficult to conceive upon what ground the court are expected to interfere. There is no objection made to the charge of the judge; no principle of law has been violated; justice has been done, and the damages found by the jury are not more than the evidence will warrant.

The only ground upon which the court can possibly interfere is, that there was no evidence at all to support the verdict of the jury. That the intestate and plaintiff contemplated, that the latter should be remunerated in some way for his long and faithful services, is not to be denied; but it is said, that such remuneration depended wholly on the will and pleasure of the testator, and that this must have been the understanding of both parties. The jury by their verdict have negatived that idea, and in doing so, were well warranted by the evidence. The services having been performed for the benefit of the testator, with his knowledge and approbation, the law implies a promise to pay for them, unless the plaintiff can show that

NEW-YORK,
May, 1808.

MASON
v.
FRANKLIN.

payment was never intended. The testimony of the plaintiff's mother-in-law appears to me to be decisive on this point; and, independent of the defendant's consent to this verdict, I can not conceive how the jury could find otherwise than they have done.

The testator, when the plaintiff became his adopted child, probably intended to devise to him his whole estate. Shall the change of circumstances, by the unexpected birth of a child, deprive the defendant of a reasonable compensation for having spent the prime of his life in the *service of the testator? Under the circumstances of the case we think it ought not.

By this decision we do not mean to draw in question the general rule of law contended for by the defendant's counsel on the argument.

We are of opinion, from the evidence in the cause, that it is not within that rule. The motion for a new trial, therefore, must be denied.

Rule refused.

[* 202]

MASON and SMEDES *against* FRANKLIN and FRANKLIN.

Where a bill was drawn on a person at *Liverpool*, payable in *London*, and the bill was duly presented at *Liverpool* and protested for non-acceptance, and afterwards protested for non-payment, at *Liverpool*, where the drawee resided, it was held that the holder had a good cause of action against the drawer on the protest for non-acceptance; that it is not necessary to set forth the protest for non-payment in the plaintiffs' declaration, (a) and if done, it may be rejected

as surplusage on a demurrer; that the protest for non-payment at *Liverpool* was sufficient, as no place of payment was designated in *London*, and that the holder might, at his election, cause the bill to be protested for non-payment in *London*, or at the place where the drawee resided.

THIS was an action of *assumpsit*, against the defendants, as endorsers of a bill of exchange. The declaration, in substance, stated, that one *John Franklin*, on the 1st of *August*, 1807, drew his bill of exchange on Messrs. *Rathbone, Hughes & Duncan*, of *Liverpool*, requiring them to pay, sixty days after sight, to *Franklin, Robinson & Co.* or order, in *London*, 185*l.* 3*s.* 2*d.* sterling; which bill was endorsed by the payees to the defendants, and by them to the plaintiffs; that on the 16th *September*, 1807, the bill was presented to the drawees at *Liverpool*, for acceptance, but they refused to accept the same, upon which it was protested for non-acceptance at *Liverpool*, of which the defendants had notice; that afterwards, on the 18th of *November*, 1807, the said bill was presented to the said *Rathbone, Hughes & Duncan* at *Liverpool*, who were requested to pay the same, according to the tenor and effect thereof, and of the endorsements thereon, to wit, at *Liverpool*; but that the said *Rathbone, Hughes & Duncan* neglected and refused to pay the bill; upon which the said bill was, in due form of law, and according to the usage and custom of merchants, protested at *Liverpool* aforesaid; of which said several premises, the defend-

(a) *Weidon v. Buck*, 4 *Johns.* 144. *Miller v. Hackley*, 5 *Johns.* 375. *Robinson v. Ames*, 20 *Johns.* 145

ants, afterwards, *to wit, &c., had notice. By reason whereof, &c. The declaration also contained the usual money counts, and an *insimul computassent*. To the first count in the declaration there was a special demurrer, and joinder. The causes of demurrer assigned were, that there was no allegation in the declaration, that the bill was shown or presented in *London*, where it was made payable; nor that the plaintiffs made any search or inquiry, or used any diligence to find any person in *London*, to whom to present the same for payment; nor that they caused the bill to be protested at *London* for non-payment, according to the usage and custom of merchants. To the other counts in the declaration there was a plea of *non assumpsit*, and issue thereon.

NEW-YORK,
May, 1808

MASON
V.
FRANKLIN

Colden, in support of the demurrer. The bill in this case being made payable in *London*, it was the duty of the holder to present it at that place, (*Chitty*, 2d ed. 185. 2 *Hen. Black.* 509. *Bayley*, 58.) to have made some inquiry after the drawees, or some person to pay the bill; and if no person was to be found, a protest should have been made in *London*, stating that inquiry had been made there, but that no person was to be found to pay the bill. A protest at *Liverpool* is a mere nullity. It is no answer to say, that no place in *London* is designated in the bill for the payment of it. The protest should state that some inquiry had been made there, at the royal exchange, (*Marius*, 26. 33.) or some place where merchants usually meet for the drawees, and that they could not be found. So if the drawee be dead, the holder should inquire after his personal representative, and present the bill to him. (*Chitty*, 2d ed. 125, 126. *Bayley*, 58, 59.) It should appear that the holder has done every thing in his power to get the bill accepted and paid according to its tenor. I am aware that it will be said, that as the bill was regularly protested for non-acceptance, the plaintiff had a right to recover on that protest. But the plaintiff has not only set out the protest for non-acceptance, but has gone further, and stated the protest for non-payment, and having done so, he is bound to show that the presentment for payment *and protest were regular. It was not necessary, perhaps, to state the protest for non-payment. But if that has been improperly made, it will destroy his action. (*Comyn, Pleader*, c. 29.)

The right of action for the non-acceptance of a bill, is founded on the implied *assumpsit* arising from the face of the bill, and is liable to be defeated by the subsequent neglect of the holder; for it is his duty, notwithstanding the protest for non-acceptance, to present it again for payment. (*Chitty*, 2d ed. 103. 181. *Kyd*, 137. *Beawes*, 460.) There is an implied or tacit engagement on the part of the holder, to call on the acceptor for payment. (7 *Term*, 581, 582.)

[* 204]

NEW-YORK,
May, 1808.

MASON
V.
FRANKLIN.

Brinckerhoff, contra. The general rule no doubt is, that the bill must be presented to the *drawee*. The only case which I find analogous to the present is that of a presentment for acceptance. If the drawee of a bill, says *Chitty*, (28. 125.) cannot be found at the place where the bill states him to reside, and it appears that he never lived there, or that he has absconded, the bill is to be considered as dishonored. Here the bill was presented to the drawee at *Liverpool*, who refused to accept it, according to its tenor and effect. It was a refusal to pay it at all, either at *London*, *Liverpool*, or at any other place. It would be of no possible advantage, after this refusal, to send the bill to *London* to be protested for non-payment. The law will not require a party to do a useless or nugatory act. The bill was presented and protested according to the usages and customs of *Liverpool* and *London*, and local usages in such cases are to be observed. (*Chitty*, 2d ed. 202.) The case of *Saunderson* and others v. *Judge*, (2 H. B. 509.) cited on the other side, was the case of a promissory note, and a special memorandum was made on the note, that it was to be paid at a particular house.

[* 205]

Harison, in reply. It is not denied that an action will lie against a drawee on a protest for non-acceptance, nor that the bill may be presented for acceptance at any place where the drawee may be found, the acceptance being a personal act. But the question is, Can a bill be protested for non-payment at any other place than that in which it is made payable? The presumption is, that the drawer has provided funds for the payment at that place. He has the *right to fix the place of payment, and the payee takes the bill on the condition of receiving his money at the place designated. The rights of the drawer, in this respect, cannot be varied by the acts of the drawee, or a third person. The plaintiff's right of action on the protest for non-acceptance may have been complete at the time, but it was liable to be defeated by a subsequent default. If the plaintiff had stated only the protest for non-acceptance, the subsequent steps would be presumed to be regular until the contrary was shown, but having thought proper to set out the protest for non-payment, he is bound to show that he has performed his duty, by presenting the bill for payment at the place fixed by the parties. It is a part of the contract between the drawer and payee, and the holder must present the bill, according to the terms of it, where it is made payable. There may be some local usages as to days of grace, or of hours of business at a particular banking house, where the bill is to be paid, which may govern; and such local usages must always be shown. But where the general law of merchants is clear and fixed, no particular usage can vary or control it

KENT, Ch. J., delivered the opinion of the court. This is a suit upon a foreign bill of exchange, drawn in this city, upon Rathbone, Hughes & Duncan, merchants at *Liverpool*, and payable sixty days after sight in *London*. The declaration states, that the bill, being regularly endorsed to the plaintiffs, was presented to the drawees for acceptance, but that they refused, and that the same was accordingly protested at *Liverpool* for non-acceptance, and notice given to the defendants; that the bill, when due and payable, was presented to the drawees at *Liverpool* for payment, who refused to pay the same, and that it was then protested at *Liverpool* for non-payment, and notice thereof also given. To this declaration the defendants demurred specially, and stated for causes of demurrer, that the declaration does not allege that the bill was presented in *London* for payment, or that the plaintiffs made inquiry, or used diligence to find any person *in *London*, to whom to present the bill for payment, or that the said bill was, according to the custom of merchants, protested in *London*.

NEW-YORK,
May, 1808.

MASON
V.
FRANKLIN

[* 206]

Upon this record, we are of opinion that a good cause of action arose upon the protest for non-acceptance, and were we to admit that the subsequent demand of payment and protest for non-payment were void acts, by being made at *Liverpool*, they would not destroy the right to recover which had previously vested; *utile per inutile non vitiatur*; that part of the declaration containing the subsequent demand and protest might in such case be rejected upon demurrer, as surplusage. But we are of opinion, that as no place of payment in *London* was designated, the demand for payment and protest for non-payment, were well made upon the drawees personally, at *Liverpool*. It would have been a very idle act for the holder to have gone into *London* to make inquiry, when no place in *London* was pointed out in the bill, and when the drawees resided at *Liverpool*, and had refused to accept the bill. The law-merchant has not pointed out any particular spot in *London* for such inquiries, and to have attempted it at large would have been the height of absurdity. The common law in general, and especially the commercial law, which forms a distinguished branch of it, is founded on the principles of utility and common sense; and it would be truly surprising, and repugnant to the very spirit of the system, if an inquiry so senseless was requisite to consummate the right of the holder of the bill. It must be a sound rule, that where no particular place of payment is fixed, a demand upon the drawee personally, is good. A general refusal to pay, was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in *London*. We do not mean to say, that the demand of payment at *Liverpool* was indispensable. The bill being payable at *London*, it would have been sufficient for the holder to have been there when the bill fell due ready to receive payment. In the present case, a protest at *London*, or a demand and protest at *Liver-*

NEW-YORK,
May, 1808.

BOOT and
BENTLEY
v.
FRANKLIN.

pool *were sufficient, and the holder might take either course. The holders elected to demand payment of the drawers personally, at *Liverpool*, and to cause the bill to be protested there, and the plaintiffs, accordingly, did all that in reason or law can be required to fix the antecedent parties to the bill.

We are, therefore, of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

BOOT and BENTLEY *against* FRANKLIN.

Where a bill was drawn on a person residing at *Liverpool*, payable in *London*, and after being protested for non-acceptance at *Liverpool*, was protested at *London* for non-payment, and the declaration stated, "that the bill not being paid, and the holders not knowing where to present the same for payment in *London*, caused the same to be protested," &c., it was held, that the protest [** 208*] for non-payment was sufficient, and where no place of payment in *London* was specified in the bill, the holder was not bound to make any inquiry after the drawee there. A general averment of notice of all the premises in a declaration on a bill is sufficient.

THIS was an action of *assumpsit*, by the endorsee against the drawer of a bill of exchange. The bill was drawn in favor of *Franklin, Robinson & Co.* on Messrs. *Rathbone, Hughes & Duncan*, of *Liverpool*, payable in *London*, being similar to the one mentioned in the preceding case.

The declaration, after stating a presentment to the drawees at *Liverpool*, their refusal to accept, and the consequent protest, proceeded as follows: "That afterwards, to wit, on the 5th of *November*, 1807, being the day on which the said bill became payable, according to the custom of merchants at *London*, the plaintiffs not having received payment of the said bill or any part thereof, and not knowing where to present the same for payment in *London* aforesaid, where the same is made payable, they caused the said bill to be protested for non-payment at *London*, according to the said custom of merchants; of all which said premises the said defendants afterwards, to wit, on the 30th of *December*, 1807, at the city of *New-York*, had notice. By reason whereof," &c.

*There was a special demurrer to the declaration, and joinder in demurrer.

Colden, in support of the demurrer. 1. There is not a sufficient averment in the declaration of notice to the defendant of the protest for non-acceptance and non-payment.

2. The plaintiffs ought to have shown that they presented the bill for payment, or made some inquiry after the drawees in *London*, and that they, or any person in their behalf, could not be found there. It would be attended with great inconvenience, if the holder of a bill payable at a particular place, might be allowed to say that he did not know where to find the drawee, and, therefore, caused it to be protested, and so look to the drawer for the amount, with damages. He ought to state, at least, that he made some inquiry, that he used due diligence to find the drawee.

Boyd, contra. 1. There is a sufficient allegation of notice in the declaration. After setting forth the presentment for

acceptance, and protest, and the subsequent protest for non-payment, it says, "Of all which premises the said defendant had notice," &c. This is according to approved precedents to be found in the books. (*Chitty*, 2d ed. 331. *Bayley*, 100.)

2. After the bill had been refused acceptance by the drawees, who lived at *Liverpool*, it was useless to inquire for them in *London*. To whom, or at what place in *London*, was the holder to present the bill for payment? *Marius* (*Advice concerning Bills*, &c. 26.) says, that where a bill is drawn on a person in *Southampton*, payable in *London*, and is refused acceptance by the drawee, to whom it has been presented at *Southampton*, it may be either protested at *Southampton*, or at *London*, for non-acceptance; and though the holder, when the bill becomes due, must present it for payment in *London*, according to the tenor of the bill, yet if a particular house be not expressed, but only that the bill is payable in *London*, the holder may, if the money is not brought to him in three days after the bill is due, cause it to be protested for non-payment in *London*, in the usual manner. It is no where said, that in such a case the *holder is bound to make inquiry after the drawee at any particular place. In the case of *Stark v. Cheesman*, (*Carth.* 509.) it was objected, that the declaration merely stated that the drawee could not be found, without showing that inquiry had been made after him; but it was held, that it was according to the custom of merchants, and that it was not necessary to state that the holder made inquiry after the drawee.

Harison, in reply. In the case from *Carthew*, there was a motion in arrest of judgment after verdict, and when the declaration stated that the drawee was not to be found, the court might intend, that it was after a reasonable inquiry. All the writers on bills of exchange, and *Marius* among the rest, say that a bill must be presented where it is made payable, and it ought to be shown that some attempt, at least, has been made to find the drawee there.

KENT, Ch. J., delivered the opinion of the court. The declaration in this suit varies from the one in the former cause, in these particulars only, viz. it states that after the bill was protested at *Liverpool* for non-acceptance, it was, when payable, protested at *London* for non-payment, with an averment that the holders did not know where to present the same for payment in *London*; and it then avers, that of all the premises the defendant had notice.

The special demurrer to this declaration states that the plaintiffs have not alleged that the bill was presented to the drawees for payment, nor that the plaintiffs endeavored to find the drawees, or made inquiry, or search for them.

Upon the argument, the declaration was objected to as bad, in matter of substance, for the want of a distinct averment that

NEW-YORK,
May, 1808.
—
BOOT &
BENTLEY
V.
FRANKLIN

[* 209]

NEW-YORK, May, 1808.

SEARS
V.
BRINK AND
BRINK.

[* 210]

the defendant had notice of the non-acceptance. The answer to this objection is, that the general avermen of notice of all the antecedent premises was sufficient, and is conformable to approved precedents. The reasonableness of the notice, either of the *non-acceptance or non-payment, is a question that cannot arise upon the pleadings. It depends upon the testimony to be disclosed at the trial. The other objection stated as a cause of demurrer has been anticipated, in a great measure, by what was observed in the former case. It was not incumbent upon the plaintiffs to state that inquiry was made in *London* for the drawees: *lex neminem cogit ad vana seu inutilia*. No place in *London* being pointed out to which the holders might resort, and the drawees residing at *Liverpool*, an attempt to search for them in such a city as *London*, would have been without any object or effect. Nor were the holders bound to go elsewhere, to seek the drawees, as the bill had directed the payment to be in *London*. They conformed their conduct to the tenor of the bill. They were in *London* on the day of payment, ready to receive payment, and they did all that they were enabled to do; they caused the bill to be there protested. The declaration in this case also states sufficient to entitle the plaintiffs to recover.

Judgment for the plaintiffs.

SEARS against C. BRINK and C. BRINK, jun.

By the 11th section of the statute to prevent frauds, it is said, "that no person shall be charged upon any promise, &c. unless the agreement on which such action shall be brought or some note or memorandum thereof

[* 211]

shall be in writing." In an action on an agreement relative to the sale of lands, it was held, that the consideration for the promise, as well as the promise itself, must be in writing. (a)

THIS was an action of *assumpsit*. The first and second counts were upon special agreements, and the third count for money paid, &c. The first count stated, that on the 20th April, 1801, by certain articles of agreement, made between the plaintiff and one *Peter Newkirk*, the plaintiff sold to the said *Newkirk* a lot of land, being lot No. 9, containing 120 acres, lying on the *Shawangunk Kill*, and which, by articles of agreement, had been sold by *James Farquhar* to *Joel Lyon*, and by *Farquhar* and *Lyon* to the plaintiff, for which *Newkirk* agreed to pay 100*l.* down, and the residue in four equal parts, the first *to be paid on the 20th November, 1801, and the others before the 20th November, 1802, with interest; and the deed was to be executed when the last payment was made; that afterwards *Newkirk* agreed with the defendants to give up the said bargain for the said land to them, and they agreed to take the same, and the plaintiff also agreed to accept of them in the place of *Newkirk*; that on the 23d April, 1803, the defendants

(a) *Kerr v. Shaw*, 13 Johns. 236. *Farley v. Cleveland*, 4 Cow. Rep. 432, and the cases cited in the opinion of Ch. Justice *Savage*.

signed a note or memorandum of their agreement endorsed on the former articles of agreement, by which they declared that they had taken *Newkirk's* bargain, and were to pay the plaintiff 841 dollars and 91 cents, the balance due for the land; by reason whereof, &c. the defendants became liable, &c. The second count was similar to the first, on a special agreement.

The defendant pleaded the general issue, with notice of special matter to be given in evidence.

The cause was tried before Mr. Justice *Spencer*, at the *Orange* circuit in *September*, 1807. The following are the material facts in the case. The articles of agreement between the plaintiff and *Newkirk*, and the memorandum of the agreement of the defendants endorsed thereon, were read and proved. The memorandum was as follows: "This is to certify that *Cornelius Brink* and *Cornelius Brink, jun.* have taken *Peter Newkirk's* bargain of said lot of land that the within article mentions, and the said *C. B.* and *C. B. jun.* is to pay the sum of 336*l.* 15*s.* 4*d.* which is the balance due on the said land to *Benjamin Sears*, dated this 23d day of *April*, 1803"

(Signed)

Cornelius Brink.

Cornelius Brink, jun.

NEW-YORK,
May, 1808.

SEARS
v.
BRINK and
BRINK.

The counsel for the defendants moved for a nonsuit, on the ground that there was no consideration for the *assumpsit*, and because the contract, as stated in the declaration, was not sufficiently proved.

The plaintiff being called on for further evidence, it was proved, that *Newkirk* agreed to give up his bargain to the defendants, who agreed to take it off his hands, and that the plaintiff consented to accept of them in the place of *Newkirk*, and that the memorandum was accordingly endorsed on the articles of agreement, and signed by the defendants; that while the plaintiff held the lot he built a house upon it, and made some improvements; that after the time for payment, according to the articles of agreement with *Farquhar*, had expired, *Farquhar* said that it was no matter, and that whoever brought the original agreement to him should have a deed.

It was further proved, that the plaintiff confessed, after the memorandum was signed, that the agreement between him and *Farquhar* was forfeited; that *C. Brink, jun.* went into possession of the land under the agreement between the plaintiff and defendants. The defendants also produced in evidence a deed from *Farquhar* to *C. Brink, jun.* for the lot, dated 10th *April*, 1804, for the consideration of 1,000 dollars.

The plaintiff also proved, that at the time the memorandum was made, he told the defendants, that the agreement with *Farquhar* had run out, and that if they bargained with *Newkirk*, they must take it at their own risk, which they agreed to do; and it was agreed that the defendants might go for the deed,

[* 212]

NEW-YORK,
May, 1808.

SEARS
v.
BRINK and
BRINK.

and that the plaintiff would let them have the articles of agreement for that purpose; that the defendants were to pay *Farquhar* for the land, and 57l. 17s. 6d. to the plaintiff; that the defendants were to pay 405l. in the whole, and that they paid to *Newkirk* 170 dollars and 58 cents; that the improvements were taken into consideration, and the articles of agreement and the papers were delivered to *C. Brink, jun.* the day after the memorandum was signed. The jury found a verdict for the plaintiff for 189 dollars, and 37 cents, subject to the opinion of the court, on a case, containing the above facts; and it was agreed, that if the court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand, otherwise, a judgment of nonsuit was to be entered.

[* 213]

*On the argument of the cause, several points were made, but from the opinion delivered by the court, it is necessary to notice but one of them, viz. that *Newkirk* not being a party to the contract, it was void by the statute of frauds, for want of a consideration.

J. Hamilton, for the plaintiff, contended, that as the plaintiff had a good right of action against *Newkirk*, which, by request of the defendants, he agreed to relinquish, and to accept of them in his place, this alone was a sufficient consideration to support the *assumpsit*; for the release of *Newkirk* was giving up a benefit or advantage, and that the defendants went into possession under the agreement, and enjoyed all the benefit of it. Besides, this agreement was reduced to writing, and there was a sufficient note or memorandum, according to the statute of frauds, to support an action. It is enough that the memorandum is signed by the party who is to be charged. The statute says that there must be *some* note in writing, which seems to imply, that the whole agreement need not be in writing, but that *parol* evidence may also be admitted. He cited *Pillans and Rose v. Van Mierop and Hopkins*, (3 *Burrow*, 1663.) 1 *W. Black.* 363. 1 *Caines*, 45. 175. 2 *Caines*, 150. 2 *Supp. to Viner*, 262.

Sudam, contra. *Newkirk* ought to have been a party to the agreement. The plaintiff had no title. If there was any interest in the land, it was in *Newkirk*. He had a right, on payment of the money, to call on the plaintiff for a deed, pursuant to their agreement. Where money is paid for land to a person who has no title, it may be recovered back; and the want of title in the plaintiff may be set up as a ground of defence against this action, notwithstanding the agreement. This was not an agreement to pay the debt of another, and if it were, it would be equally void for want of a consideration. If any thing, it is a contract for the purchase of land; and if there was any consideration, it must have moved from *Newkirk*. He and the defendants are the proper parties, and the assent

of *Newkirk*, as well as the consideration, ought to *appear in the contract. The want of a consideration cannot be supplied by *parol* evidence.

NEW-YORK,
May, 1803

SEARS
V.
BRINK and
BRINK.

In the case of *Waine v. Warlters*, (5 *East*, 10. See *Roberts on Frauds*, 116. 121. 6 *East*, 307.) it was decided, that the consideration of a promise, as well as the promise itself, must be in writing, and that, by the statute of frauds, *parol* evidence is inadmissible to show the consideration.

VAN NESS, J., delivered the opinion of the court. The first count in the declaration, which is a special one, is that on which the plaintiff is to recover, if at all.

The consideration to support the defendant's promise is averred to be, that *Peter Newkirk* agreed to assign or give up to the defendants, the contract for the lot of land mentioned in the case. This is a material averment, and must be proved, or the plaintiff must fail.

It has been urged, that a promise in writing, without a consideration, is valid, and the case of *Pillans & Rose v. Van Mierop & Hopkins* has been relied upon to support that position: But that case has been overruled both here and in *England*. (See *Bollard v. Walker*, decided in *January term*, 1802. *Rann v. Hughes*, 7 *Term*, 350, in the note. *Roberts on Frauds*, 7.) A promise in writing, without a legal consideration to sustain it, is as much a *nudum pactum*, as a *parol* promise. It was never the intention of the legislature to render that a valid contract when reduced to writing, which would not be so without it.

It remains then to be seen, whether the plaintiff has given any legal evidence of the consideration stated in the declaration; and this depends upon the true construction of the 11th section of the statute for the prevention of frauds.

On the part of the plaintiff, it is contended, that the consideration may be proved by *parol*, though it is admitted that the promise must be in writing.

On the part of the defendants, it is insisted, that the consideration, as well as the promise, must be in writing, and that *parol* evidence can in no case be received to prove the consideration. The words of the statute are, "That no action shall be brought, &c. to charge, &c., upon any special promise, to answer for the debt of another, or to charge any person, upon any agreement made *upon consideration of marriage, or upon any contract or sale of lands, &c., or any interest in or concerning them, &c., unless the agreement on which such action shall be brought, or some note or memorandum thereof shall be in writing, signed by the party to be charged therewith," &c.

[* 215]

I am clearly of opinion, that the consideration, as well as the promise, must be in writing. The statute provides that the party shall not be charged, unless the *agreement* upon which

NEW-YORK,
May, 1808.

FOOTE
v.
COLVIN.

the action shall be brought, be in writing. This means the whole agreement, of which the consideration forms an essential and material part.

It is as necessary to the prevention of fraud and perjury, that the consideration which leads to the promise should be in writing, as the promise itself. The word *agreement* comprehends the consideration as well as the promise. This is the construction which has been given to the statute, in a late case decided in *England*; (*Waine v. Warlters*, 5 *East*, 10.) and it appears to be a sound construction, and one which this court is disposed to adopt.

The contract mentioned in the case, and upon which the present suit is brought, does not set forth the consideration with sufficient precision and certainty; if the parol evidence be excluded, the consideration is not proved, and the plaintiff must, therefore, fail.

The decision of this point renders it unnecessary to give any opinion on the other questions which were made on the argument.

The court are, therefore, of opinion, that according to the provision in the case, there must be a judgment of nonsuit.

Judgment of nonsuit.

[*216] *I. C. FOOTE and ELISHA LITCHFIELD *against* COLVIN and others.

Where the owner of land agrees with another that he may sow the land on shares, they may maintain a joint action of trespass against a third person who cuts and carries away the crop. (a) If A. buys land with the money of B. and takes a conveyance to himself, he is a trustee for B. Such an implied or resulting trust is not within the statute of frauds, and may be proved by parol; and the land may be seized and sold on an execution under a judgment against B. the *cestui que trust*. (b)

THIS was an action of trespass. The declaration contained two counts. The first was for entering the close of the plaintiffs, treading down the grass, &c., cutting and carrying away the corn, &c. The second count was for taking and carrying away 400 sheaves of rye, and 4,000 sheaves of wheat, of the value of, &c., of the proper goods and chattels of the plaintiffs. The defendants pleaded not guilty, with a notice subjoined to the plea, that *Colvin*, one of the defendants, would give in evidence at the trial, that the *locus in quo*, mentioned in the first count, was his freehold, &c., and that the other defendants would also give in evidence, that the *locus in quo*, &c., in that count, was the freehold of the said *Colvin*, and that they, as his servants and by his command, entered, &c.

The cause was tried at the *Albany* circuit, in *April*, 1807, before Mr. Chief Justice *Kent*.

(a) *DeMott v. Hageman*, 8 *Cow. Rep.* 220. See *Bradish v. Schenck*, 8 *Johns. Rep.* 117. 2d ed

(b) *Jackson v. Colvin*, 2 *Wentl. Rep.* 570.

At the trial, the plaintiffs abandoned the first count, and proceeded on the second only.

It was proved, that *Litchfield*, one of the plaintiffs, in the autumn of 1805, sowed about fourteen acres with rye, on a farm called *Sowls's* farm, which, on the 12th May, 1804, had been conveyed by *Jonathan Sowls* to *Foote*, the other plaintiff, in fee; that it was agreed, that *Foote* should have one third of the crop, and *Litchfield* the remainder, to be divided upon the field. It was also proved, that the defendants cut and carried away about two thirds of the crop. It appeared that *James Litchfield*, the father of one of the plaintiffs, lived with his family on the farm when the rye was sown, and that when it was cut, one *Brett* was in the actual possession of the farm, as a tenant under *Foote*, the other plaintiff. The value of the rye cut and carried away was proved.

NEW-YORK
May, 1806.

FOOTE
v.
COLVIN.

*The defendants then moved for a nonsuit, on the ground that the plaintiffs, not having shown a joint property in the rye, could not recover, but the objection was overruled.

[* 217

The defendants then offered to give in evidence, that one *Hunt* obtained a judgment in this court against *James Litchfield* for 7,500 dollars debt, which was docketed the 18th July, 1803; that the farm in question was purchased by the plaintiff *Foote*, with the money of *James Litchfield*, for the express purpose of avoiding the effect of that judgment; that immediately after the purchase, *James Litchfield* entered and was in possession until the winter of 1806, after the rye was sown; that he then absconded with his family; that the farm was then leased to *Brett* by *Foote*, who appeared as owner, but who never had been in the actual possession; that *Litchfield*, the other plaintiff, was a minor, and lived and worked with his father, *James Litchfield*, and that the agreement between him and *Foote* about the division of the crop, was made with the privity of *James Litchfield*, and with an intent fraudulently to cover the property in the rye, and to defeat any execution on the judgment in favor of *Hunt*; that the sheriff, by virtue of an execution on that judgment, on the 26th June, 1806, sold and conveyed to the defendant *Colvin*, all the estate, right, title and interest of *James Litchfield* in and to the said farm, and that *Colvin*, and the other defendants, by his command, and as his servants, peaceably entered upon the land, and cut and carried away the rye. But this evidence, thus offered by the defendants, was rejected by the chief justice, because it was inadmissible under the general issue, and because, if admitted, it would merely establish a trust estate in *James Litchfield*, of which a court of law could not take notice.

The jury found a verdict for the plaintiffs.

A motion was made to set aside the verdict and for a new trial:

*1. Because, the plaintiffs did not prove a joint property in the rye:

[* 218]

NEW-YORK,
May, 1808.

FOOTE
v.
COLVIN.

2. Because, the evidence offered by the defendants, and overruled by the judge, ought to have been admitted.

Henry, for the defendants. 1. In a joint action of trespass, it is necessary for the plaintiffs to show a joint interest or property in the thing which is the subject of the suit. *James Litchfield* was in possession of the farm, but *Foote*, one of the plaintiffs, never was in possession. The agreement as to the division of the crop was between the plaintiffs, *Foote* and *Elisha Litchfield*. *Foote* could have no interest in the crop until after the severance. In *England*, a parson is entitled to a tenth of the crop, but he can maintain no action for *predial* tithes until after severance. The relation between *Foote* and *Litchfield*, the plaintiffs, is that of landlord and tenant. *Buller* (*N. P.* 85.) says, "If *J. S.* agree with the owner of the soil to plough and sow the ground for half of the crop, *J. S.* may have his action for treading down the corn, and the owner of the soil is not jointly concerned in the growing corn, but is to have half after it is reaped, by way of rent, which may be of other things than money." *Foote*, therefore, is the only person to maintain trespass in this case.

2. But the ground on which the defendants principally rely in this case is, that the evidence offered by the defendants and overruled, was proper and admissible. That *Elisha Litchfield* was a minor and the son of *James Litchfield*, is a strong circumstance to induce a belief, that the transaction was fraudulent in regard to *Hunt*, the judgment creditor. The facts must be taken to be according to the evidence offered. So that there was a clear resulting trust to *James Litchfield*. Such a trust is not within the statute of frauds, and may be proved by *parol*. By the 4th section of the act concerning uses, (*Rev. Laws*, v. 1. p. 68.) the sheriff is authorized "to seize in execution all such lands, &c., as any other person or persons be, in any manner of wise seised or possessed to the use, or in trust for him against whom execution *is sued," &c. It is the disposition of the legislature and of the laws of this state, to give creditors a power to take every species of property belonging to the debtor, and to apply it to the satisfaction of his debts. Thus it has been decided, that an equity of redemption may be sold by the sheriff on a *feri facias* against the property of a mortgagor. (*Caines's Cases in Error*, p. 47. *Waters and others v. Stewart*.)

Again, every thing which amounts to a denial of the right of action may be given in evidence by the defendant in an action of trespass, under the general issue. (*Bac. Ab. Trespass*, K. *Buller*, *N. P.* 90. 7 *Term*, 354. 8 *Term*, 403.) The question always is, Who was the owner of the land? and the defendant may show that he had a title or right to the possession

Kirtland and Champlin, contra. The plaintiffs, in relation to
170

the crop, are to be considered as tenants in common, having a joint interest in it, for which they may bring a joint action. In the case of *Hare and others v. Celey*, (*Cro. Eliz.* 143.) it was decided that persons situated like the present plaintiffs, were tenants in common, and might bring a joint action for spoiling the corn, though the owner of the fee alone could maintain trespass *quare clausum fregit*. The case of *Welch v. Platt*, cited from *Buller*, (*N. P.* 85.) is taken from a manuscript, and is not law.

NEW-YORK
May, 1808.

FOOTE
v.
COLVIN.

This may be considered like an action of ejectment. There can be no doubt that *Foote* had the legal estate, against which no equitable interest ought to be allowed to be set up by the defendants. But it is not alleged that *James Litchfield*, though he might be a *cestui que trust* as to the land, had an interest in the crops; crops are considered as chattels, and not as inseparably incident to the freehold. It does not follow, therefore, that the judgment creditor, admitting the *lien* on the lands of the debtor, would have a right to the crops. Again, the matters offered in evidence ought to have been pleaded by way of justification, so as to give the plaintiffs an opportunity to reply, and were not proper or admissible as evidence under the general issue. (1 *Str.* 61. 1 *Ld. Raym.* 732. *Salk.* 287. 3 *Term.* 292. *Cro. Eliz.* 329.)

[* 220]

*But admitting that the land was purchased with the money of *James Litchfield*, and that this would create an implied or resulting trust, still parol proof was not admissible to establish this trust, against the express word of the deed to *Foote*. In the case of *Ambrose v. Ambrose*, (1 *Peere Wms.* 321.) Lord *Hardwicke* considered it within the statute, and that a declaration in writing was necessary to establish such a resulting trust. So, in *Kirk v. Webb*, (*Prec. in Chan.* 84. See also *Roberts on Frauds*, 94, and note 39.) it was held, that where *A.* purchases land with the money of *B.*, a resulting trust for *B.* could not be created by parol, because it would contradict the deed, and would be directly against the statute of frauds.

Henry, in reply. The case of *Hare and others v. Celey*, applies only to the first count of the declaration in this cause, which was abandoned at the trial. In that case, each party furnished the seed, and were considered as tenants in common.

Wherever a person purchases land, he takes the corn growing as an incident, unless the crops can be claimed as *emblements*. If the crops are chattels, then the plaintiffs are entitled to a proportion of them; but if they passed with the land, they are entitled to the whole, on the ground of the interest of *James Litchfield* as a *cestui que trust*.

SPENCER, J., delivered the opinion of the court. On the motion for a new trial, the defendants' counsel have insisted,

NEW-YORK,
May, 1808.

FOOTE
v.
COLVIN

1. That the plaintiffs did not prove a joint property in the rye, which was the subject of the suit.

2. That the parol evidence offered and overruled, ought to have been admitted, to show that *James Litchfield* furnished to *Foote* the purchase-money, with which the *locus in quo* was bought; as it created a resulting trust for *James Litchfield*.

3. That such resulting trust estate was liable to be sold on the execution issued at the suit of *Hunt*, and being sold to *Colvin*, he thereby acquired the legal interest in the land, and in the growing crop.

[* 221]

*4. That the evidence thus offered and overruled was proper under the general issue.

On the first point, I am inclined to think that the plaintiffs had a joint property in the growing crop. Assuming for the present, that *Foote* was the legal owner of the land, *E. Litchfield* sowed on shares, and on reaping the crop, they were to have it in certain proportions. This case differs from that of *Newcomb and others v. Ramer*, (2 *Johnson*, 421. in the notes) in this, that the rent was of no proportion of the crop, but was specific as to the amount. This opinion is supported by the case of *Hare and others v. Celey*, (*Cro. Eliz.* 143.) and seems best to promote the intentions of landlord and tenant. If the portion reserved for the landlord was to be considered as rent, and in which he had no interest until severance and delivery, it would put it in the power of tenants clandestinely to alienate the produce of the land, to the injury of the person who had enabled them to raise the crop.

The second point has been virtually decided in the case of *Jackson, ex dem. Kane, v. Sternbergh*. (1 *Johnson*, 45. in note.) In that case, *Kane* had obtained a judgment against *Sternbergh*, and his lands were sold on an execution to *Cox*, at the instance of the plaintiff. The sheriff gave a deed to *Cox*, and he conveyed to the plaintiff. It was decided, that the lessor of the plaintiff was the real purchaser, by *Cox*, his agent, and that his purchase was a resulting trust, which might be proved by parol. It seems to be perfectly well settled, that if *A.* buys land, and takes a conveyance, in the name of *B.*, it is a resulting trust for him who pays the purchase-money. raised by implication of law, and, therefore, saved by the statute. There is a diversity of opinion, whether, notwithstanding such trusts are not affected by the statute, there should not be a declaration in writing, or an acknowledgment in the deed from whom the consideration moved. In the case of *Ambrose v. Ambrose*, (1 *P. Wms.* 323.) the lord chancellor is reported to have said, that "it plainly appearing upon the evidence on both sides, that the consideration money of this purchase was the proper money of *A.*, had it not been for the statute of frauds, this would have made a resulting trust." However great the authority of Lord *Hardwicke* deservedly is, he is opposed by various decisions, and the opinions of elementary writers. The cases in 2 *Vent.* 361. and

[* 222]

Vern. 367. (*Gascoigne v. Thwing*) consider such trusts as saved by the statute without any deed declaring them, it being required that the proof should be clear, that the purchase-money was really the property of him who claims the estate. To the same effect are 3 *Woodeson*, 439. and 21 *Vin.* 497. in the notes. In the present case, the evidence offered and overruled would, we are to presume at present, have established the fact, that the farm was purchased with *James Litchfield's* money, and that *Josiah C. Foote* was the mere pipe of conveyance. This proof would consequently have shown an estate in *James Litchfield*, liable to be sold on execution, under the 4th section of the act concerning uses. (*Rev. Laws*, vol. 1. p. 68. sec. 4.) Indeed, without the aid of that statute, I consider *James Litchfield*, if he advanced the purchase-money, as having an interest liable to be sold on execution. This evidence, then, was improperly overruled.

NEW-YORK,
May, 1808.
FOOTE
v.
COLVIN.

There may be an interest in growing crops in one man, whilst the title to the land is in another. The one does not necessarily follow the other; but when the right to any portion of the crop exists in the owner of the soil, there, unless in certain excepted cases, the ownership of the land draws after it that of the crops, and it cannot admit of a doubt, that a sale of the land simply, by the owner both of the land and crop, carries the property of the crop to the purchaser. If a voluntary sale would do this, a sale under an execution will produce the same consequences. It follows, then, that *Foote*, being a trustee for *James Litchfield*, and it being a resulting trust susceptible of parol proof, and the interest of *Litchfield* being vendible under execution, *Colvin*, as a purchaser on the sheriff's sale, acquired all *Foote's* right, both to the land and the crop. *Foote* then ceased to have any interest, and in this point of view the *proof would have shown that the plaintiffs had not a joint interest in the rye.

[* 223

This was proper evidence under the general issue, it being a settled and established principle, that any thing may be given in evidence that amounts to a denial of the right (and particularly of a freehold in the defendant) to the *locus in quo*. (7 *Term*, 355. 8 *Term*, 405. 1 *Ld. Raym.* 732. 1 *Leon.* 301. *Gilb. Ev.* 258.)

The court are of opinion, that a new trial ought to be granted, with costs to abide the event of the suit.

New trial granted.

NEW-YORK,
May, 1808.

JACKSON
v.
DOBBIN.

JACKSON, *ex dem.* SAGOHARIE and others, *against*
DOBBIN.

An acknowledgment by a defendant in ejectment, that he went into possession under one of the lessors of the plaintiff, was held sufficient evidence to enable the plaintiff to recover, it being a matter of fact for the jury to decide, whether the defendant held under the plaintiff or not. (a)

THIS was an action of *ejectment*, for lot No. 39, in the township of *Junius*. The cause was tried before Mr. Justice *Tompkins*, at the circuit in *Seneca* county, on the 22d *June*, 1807.

At the trial, the lease, entry and ouster were confessed, and the possession of the defendant proved. In *June*, 1794, *Murray & Mumford*, two of the lessors of the plaintiff, went on the lot in question, which was surveyed by their direction, and a log-house built upon it, but none of the land was then cleared. In *May* or *June*, 1805, the defendant, in a conversation with a witness for the plaintiff, offered a part of the lot for sale, and showed articles of agreement for the purchase, made between him and *Murray & Mumford*, and said that he had paid them fifty dollars in part. At another time, the defendant said, that Mr. *Ledyard* had the care of the lot for *Murray & Mumford*. The defendant had cleared a part of the lot, and sown a crop of wheat. In 1805, the defendant said that he purchased the lot of *Murray & Mumford*. In *June*, 1806, an *agent of *Murray & Mumford* called on the defendant, to know whether he meant to pay the money due on his contract. The defendant said that he did not intend to pay any more money until he could get a title for the lot; that a Mr. *Harris* had claimed title to the lot, and threatened to bring an action of ejectment. On being urged to say what he meant to do, the defendant said that he did not hold the land under any contract; that he did not intend, nor was he liable to pay any more at present; that no contract was made between him and *Murray & Mumford*, but only twenty dollars had been paid, which had become forfeited, and that he did not hold possession under any person.

The judge charged the jury, that a prior possession of the lessors of the plaintiff was sufficient to maintain the action; that the entry of *Murray & Mumford*, and the survey of the lot, and erecting a log-house upon it, was sufficient evidence of possession, and put the defendant on his title; that if the defendant had confessed the title of the plaintiff, that was sufficient to enable him to recover; that if the defendant claimed under *Murray & Mumford*, he thereby recognized their title, and was entitled to notice to quit, unless he had afterwards denied that title, in which case such notice would be dispensed with. The jury found a verdict for the plaintiff.

A motion was made by the defendant for a new trial, for the misdirection of the judge, and because the verdict was against evidence.

[* 224]

E. Williams, for the defendant. To maintain this action, the plaintiff must show a right of possession; not a mere claim or prior possession. A mere prior possession for less than 20 years, without some evidence of title, will not support this action: and whether a mere possession for 20 years would be sufficient, seems not to have been expressly decided by the court. The plaintiff did not offer any proof of title; nor was there that kind of possession as would give a title. A mere possession fence, as it is *called, unless accompanied with a continual claim, is not considered as evidence of title. (2 *John*. 235.) Again, if the plaintiff relies on a prior possession, he ought to show that he was in possession when the defendant entered. If it should be said, that the defendant is estopped by his contract with *Murray & Mumford* from denying their title, it may be answered that the contract ought to have been produced and proved. Parol evidence of its contents was inadmissible.

NEW-YORK,
May, 1808.

JACKSON
V.
DOBBS

[* 225]

Hopkins, contra. It is not necessary, perhaps, to inquire in this case, whether a prior possession for less than 20 years, would enable a party to maintain ejectment. It is enough that the defendant has acknowledged the title of the lessors of the plaintiff. Where one goes into possession under the title of another, and afterwards disclaims that title, he is bound to restore the possession, and the other party may bring his action of ejectment. [He was stopped by the court.]

Per Curiam. This is a clear case. There is an unequivocal acknowledgment by the defendant, that he went into possession under *Murray & Mumford*, two of the lessors of the plaintiff; and whether he held under them or not, was a matter of fact for the jury to decide. The motion for a new trial must be denied.

Rule refused.

NEW-YORK,
May, 1808.

JACKSON
v.
WALSH.

*JACKSON, *ex dem.* DONALLY and others, *against*
WALSH.

Where two trustees, being a corporation, signed their names separately to a lease, and affixed the corporation seal separately to each name, it was held a good execution of the lease. Nine years is not a sufficient lapse of time, to afford a presumption of reëntry for the non-payment of rent. (a) Entries made by a clerk in the books of trustees, being a corporation, by the direction of the trustees, are not evidence in a cause in which they are interested; nor is the evidence of the clerk who made the entries of the declarations of the trustees admissible.

[* 227]

THIS was an action of ejectment for land in *Newburgh*, in the county of *Orange*. The cause was tried at the *Orange* circuit, on the 9th of *September*, 1807, when a verdict was taken for the plaintiff, subject to the opinion of the court, on the following case: The premises in question were part of certain lands called the glebe lands in *Newburgh*, granted by a charter dated the 26th of *March*, 1752, to certain persons styled "The trustees of the parish of *Newburgh*." (See *ante*, p. 115.) On the 1st of *September*, 1774, *Jonathan Hasbroeck* and *Isaac Belknap*, being the trustees of the parish of *Newburgh*, duly elected under the said charter, demised the premises in question to *Peter Donally*, and to his heirs and assigns, to have and to hold the same for and during the natural lives of *Peter Donally*, *Thomas Donally* and *Andrew Donally*. The lease contained a power of reëntry for non-payment of rent, in case no sufficient distress should be found on the premises. A seal was made for the use of the trustees, who were a corporation by the charter, on which were engraved the letters N. B. The lease was signed with the names of both the trustees, and the seal above described was affixed to their names. *Peter Donally* died in possession of the premises, on the 29th of *November*, 1782, leaving the lessors of the plaintiff his heirs at law. After his death, his widow and his children, who were minors, remained in possession of the premises until the 3d of *December*, 1792, when she assigned the lease, by an endorsement thereon, to one *Moses Lyons*. The assignment was of all her right, title, interest and claim to the premises. In 1786 and 1788, the widow of *Peter Donally* paid three pounds to the lessors as the balance then due for arrears of rent; and in *April*, 1783, *Thomas Donally*, one of the children of *Peter Donally*, paid to the lessors, seven pounds and four shillings in full for the rent until the 1st of *May*, 1783. The widow *ot *Peter Donally*, at the time the lease was assigned, left the premises, and *Lyons* took possession, and continued possessed until *June*, 1795, when the defendant took possession.

The defendant set up by way of defence, that the trustees of the parish of *Newburgh* had reëntered on the premises for the non-payment of rent, and had afterwards demised the same to him. The evidence of this reëntry and demise, was a minute or entry in the books of account kept by the trustees, dated the 18th of *June*, 1795, mentioning that the premises had been reëntered and sold for rent in arrear.

One *Ammerman*, a clerk of the trustees, who made the en-

(a) See *Jackson v. Elsworth*, 20 *Johns*. 180.

tries in the books, testified that he made them by the direction of *Timothy Hudson* and *Phineas Howell*, who acted as trustees, and that he knew nothing of the reëntry except from the entry in the books, and from what the trustees told him, and that the sale in *June*, 1795, was founded on such reëntry. The defendant also produced a lease from the said trustees, dated the 18th of *June*, 1795, which was objected to, but allowed to be read. He also read in evidence the act of the legislature, passed the 6th of *April*, 1803, to amend the charter of the glebe land in the *German Patent* in the village of *Newburgh*, and a lease from the trustees elected under that act, dated the 6th of *April*, 1803. This was objected to, as being subsequent to the commencement of this suit, and because the trustees had no power to make such a lease, but it was allowed to be read.

NEW-YORK,
May, 1808
JACKSON
v.
WALSH.

On a motion to set aside the verdict, the following points were raised by the plaintiff for the consideration of the court:—

1. That the premises descended to the lessors as heirs at law of *Peter Donally*, deceased.
2. That no reëntry was ever made, or that there was not sufficient evidence of such reëntry.
- *3. That the leases to the defendant ought not to have been admitted in evidence on the trial.

[* 228]

Fisk, for the plaintiff, cited *Woodfall*, 139. 249. 2 *Black. Com.* 144. 1 *Saunders*, 287. note 16.

J. Radcliff, contra, contended, 1. That the lease to *Peter Donally* was executed by *Hasbroeck* and *Belknap*, in their individual capacities; and could not be valid as a deed of the trustees, unless it was under their corporation seal.

2. That this was an estate *per autre vie*, which, by the statute of 29 *Car. II.* and 14 *Geo. II.* passed to the executors and administrators of *Peter Donally*. (*Cruise's Dig. tit. 3. § 92—94.*)

3. That the lapse of time from the 1st of *May*, 1783, to 1792, connected with the evidence of *Ammerman*, was sufficient to raise the presumption of a reëntry for the non-payment of rent. (*Jackson, ex dem. Goose, v. Demarest*, 2 *Caines*, 382.)

Fisk was about to reply, but was stopped by the court.

Per Curiam. The lease of 1774 is valid. The trustees appear to have had a common seal, which is affixed to the lease. The signing of their names separately was unnecessary, but does not vitiate the deed as a corporate act. The lapse of time alone does not afford the presumption of a reëntry for the non-payment of rent, and the testimony of the clerk is no evidence. We are clearly of opinion that the plaintiff is entitled to recover.

Judgment for the plaintiff.

NEW-YORK,
May, 1808.

BROWER
v.
JONES.

*TILLOTSON *against* PRESTON.

Where a declaration was of November term, 1806, and an imparlance over to February term, 1807, when the defendant pleaded, that on the 7th January, 1807, he paid the plaintiff the several sums of money, &c., the plea was held good, without stating that he had paid the interest and the costs which had accrued. If a party accepts the principal of his debt, he can not afterwards sue for the interest. (a)

THIS was an action of *assumpsit*. The declaration, which was of November term, 1806, contained five counts for goods sold and delivered, &c., money had and received to the plaintiff's use, &c.

There was an imparlance to the first day of February term last, and the defendant pleaded, 1. *Non assumpsit*; 2. That after the said supposed promises and undertakings, &c., to wit, on the 7th day of January, 1807, at, &c., he paid to the plaintiff the several sums of money mentioned in his declaration, &c. To this plea of payment the plaintiff demurred specially, for the following causes: 1. That the plea did not state that the payment was made since the last continuance, nor is it verified by affidavit: 2. That it does not allege that the defendant had paid to the plaintiff the interest or the costs of suit which had accrued prior to the time of payment, &c.

Root and *E. Williams* argued in support of the demurrer.

Griffin and *Hopkins*, contra.

Per Curiam. The demurrer is not well taken. If the plaintiff has accepted the principal, he cannot afterwards bring an action for the interest. It is not a plea *puis darrein continuance*, but a regular plea of payment after an imparlance.

The plaintiff may withdraw the demurrer and reply, on payment of costs.

(a) See *Williams v. Houghtaling*, 3 Cow. Rep. 37, and the reporter's note

[* 230]

*BROWER *against* JONES.

Where a creditor received from his debtor an order on a third person for the amount of his debt, dated the 9th December, 1804, and which the drawee agreed to pay in ten or fifteen days, and the order was not presented until March, or many weeks after, and in the mean time the drawee failed; it was held that the holder had not used due diligence to get the money, and that the loss ought to fall upon him.

THIS was an action of *assumpsit*. The first count was on a bill of exchange; the second was for money had and received to the use of the plaintiff. The cause was tried at the *Dutchess* circuit, before Mr. Justice *Thompson*, on the 21st September, 1807.

The plaintiff produced and proved the following bill or order:—

IN CHANCERY.

Smith W. Jones }
 v.
Thomas Thorn. }

STATEMENT.

NEW-YORK,
 May, 1808.
 BROWER
 v.
 JONES.

April 9th, 1800.

Balance due this day, after the payment of
 235 dollars to *Peter Mesier*, jun. £129 7 9
 Interest to the 9th *December*, 1804, 42 5 1
 £171 12 10

SIR,

Please to pay to *William Brower*, or order, the amount
 within mentioned, and this shall be your discharge.

December 9th, 1804.

From your's, &c.

Smith W. Jones.

"To *James Scott Smith*, Esq.
 Witness, *Cornelius W. Brower*."

The witness, *Cornelius W. Brower*, testified, that he was present at a conversation between the plaintiff and defendant, previous to the defendant's giving the order, from which he understood, that the defendant, being considerably indebted to the plaintiff, agreed to deliver to the plaintiff a mortgage of one *Thomas Thorn*, as a further security for the money due to the plaintiff; that the plaintiff had demanded payment of the mortgage of *Thorn*, which he had refused, and that the mortgage had been put into the hands of *Peter Mesier*, jun., to have it foreclosed, and it was agreed, that when the money due on the mortgage should be collected, it should be received by the plaintiff in discharge of his demand against the defendant; that *Mesier* had delivered the mortgage to *James Scott Smith* to do the business, and that *Smith* had received the money, but refused to pay it to the plaintiff, and would pay it only to the defendant or his order; that the plaintiff and defendant went from *Dutchess* county, where they resided, to *New-York*, for the purpose of receiving the money, and giving the necessary discharge to *Smith*; that the plaintiff and defendant called on *Smith*, and demanded the money of him; that *Smith* said he could not then pay it, that he had kept the money a long time in his hands, but had lately made use of it; and that he would pay it in ten or fifteen days, and proposed to accept an order drawn on him by the defendant in favor of the plaintiff for the amount; to this the plaintiff objected, declaring that he would not accept *Smith* for the payment, but would look to the defendant alone for the money. After much conversation, the above order was finally drawn. At the time it was signed, the defendant asked *Smith* whether, in case it was not paid at the time agreed upon, it would be obligatory on him as a promissory note to which *Smith*

[* 231 !

NEW-YORK,
May, 1808.

BROWER
v.
JONES.

answered, that it would amount to pretty much the same thing; that the plaintiff then received the order, on the express condition, that if *Smith* did not pay it, the defendant was to be accountable for the amount; that the plaintiff, in *March*, 1805, called on *Smith* for payment, who said that he was unable to pay it, but that he would pay it in a few weeks. It appeared that the plaintiff had been called upon for the money in *April*, 1805, and had refused payment.

[* 232]

On the part of the defendant, *Smith* was called as a witness, and testified, that prior to 1800, *Mesier* put into his hands a mortgage given by *Thorn* to the defendant, and assigned by him to the plaintiff, in order to have the same foreclosed; that he caused the mortgage to be foreclosed, and received the money due upon it, of which he *gave notice to *Mesier*; that the assignment to the plaintiff was so defective, that it became necessary to make the defendant the complainant in the bill for a foreclosure; that after the notice was given to *Mesier* of the money being collected, the plaintiff called on the witness with a letter from *Mesier*, mentioning him to be the person to whom the mortgage was assigned, and to whom and to *Mesier* the money belonged; that the plaintiff frequently called on the witness about the money collected on the mortgage, and was told by the witness that the mortgage and assignment endorsed had been given up to the purchaser under the decree of foreclosure; and that as the suit was in the name of the defendant, it was necessary, for the security of the witness, to have a discharge from the defendant, when the money was paid; that the witness gave to the plaintiff an order of the same purport as the one above stated, which the plaintiff agreed to take to the defendant to be signed by him, and to return with it and receive the money; that the plaintiff frequently said that the defendant had no interest in the money, and was dissatisfied that the witness should insist on a discharge from him; that some time afterwards, the plaintiff and defendant called on the witness, when he understood that the defendant had refused to sign the order shown to him by the plaintiff, but had come to inform the witness that he had no interest in the money, and that he might pay it over to the plaintiff; that the witness told the defendant that as the mortgage and assignment had been delivered to the purchaser of the premises, it was necessary that the witness should have some writing from the defendant to prove that he had paid over the money; that the witness then made the statement, and drew the order above stated, which the defendant, on being assured by the witness that it was a matter of form only, and that the defendant would not be injured by it, after some hesitation, consented to sign; that the witness then informed the plaintiff, that he would pay the money in about ten days; that he afterwards provided *money for the purpose, and should have paid the order at the time limited, or within two or three weeks, had it been presented.

[* 233]

The witness admitted that the money had been demanded or the order presented, several times during the winter, and that he had refused payment; and that before the order was presented in *March*, his circumstances had become so embarrassed, that he was unable to pay his debts; that the witness always considered the money as belonging to the plaintiff; that the defendant had no interest in it, but gave the order merely at the request of the witness, and for his indemnity.

NEW-YORK,
May. 1808.

BROWER
v.
JONES

On this evidence, the jury found a verdict for the plaintiff, for 516 dollars and 68 cents.

A motion was made to set aside the verdict, as being against evidence.

J. Tallmadge, for the defendant.

Rudd, contra.

VAN NESS, J., delivered the opinion of the court. Admitting that an action can be maintained on the order stated in this case, I think that, upon the facts now before us, the plaintiff ought not to recover.

If the order had been drawn to secure the payment of a pre-existing debt due from the defendant to the plaintiff, and that fact had been satisfactorily and clearly proved, the plaintiff's case would have been much stronger. There is some reason to believe that such is the fact; but the evidence leaves it doubtful whether the plaintiff's demand had not been extinguished by the assignment of the mortgage against *Thorn*.

Cornelius W. Brower and *James S. Smith*, the former a witness on the part of the plaintiff, and the latter on the part of the defendant, differ very materially in their relation of the circumstances attending the giving of the order, and of what took place afterwards. As far as their testimony was irreconcilable, the finding of the jury is conclusive; they having the right to judge to which of them they would give credit. *Smith*, however, is not impeached, *and some facts are stated by him, and not disproved or contradicted by *Brower*, which, in my opinion, entitled the defendant to a verdict. The order is dated the 9th of *December*, 1804, and was accepted by *Smith* to be paid in ten or fifteen days. *Smith* says, that at the time limited, and for two or three weeks thereafter, he was willing and prepared to pay it; but that the order was not presented for payment until some time in the ensuing *March*, when he had become insolvent.

[* 234]

Independently of its being the duty of the plaintiff to present the order for payment at the time when *Smith*, by the terms of his acceptance, agreed to pay it; and independently also of the plaintiff having failed to prove any kind of notice of non-payment to the defendant, I am inclined to think that the defendant is discharged, on the ground of gross negligence on

NEW-YORK,
May, 1808.

ALLISON
v.
MATTHIEU

the part of the plaintiff, whereby this money has been wholly lost.

I think it highly probable, also, that the plaintiff accepted the mortgage and assignment thereof, in satisfaction of his demand against the defendant. If that be so, justice has been done, and the plaintiff ought not to recover on this order. The court are, therefore, of opinion, that a new trial ought to be granted, on payment of costs.

New trial granted

[* 235]

*ALLISON against MATTHIEU.

Where A. and B. applied to C. to purchase goods for A., who was recommended by B., and by their direction the goods were sent to B.'s house, who afterwards took a bill of sale of them from A., who absconded without paying C., it was held, that C., in an action of trover against B., might go into evidence to show, that the goods had been obtained from him fraudulently, and by a collusion between A. and B. under pretence of a purchase, for fraud would avoid the contract of sale; and that the plaintiff might give evidence of subsequent acts of collusion and fraud by A. and B. to obtain goods from other persons, in order to show the previous intention of A. and B., which the jury might infer from circumstances

THIS was an action of *trover* for certain articles of furniture. The cause was tried at the last *sittings* in *New-York* before Mr. Chief Justice *Kent*.

At the trial, it was proved that the defendant and one *Le Blanc*, about the 1st of *October*, 1804, came to the shop of the plaintiff, who is a cabinet maker, when the defendant said to the plaintiff, that *Le Blanc* wished to buy some furniture. They selected several valuable articles, (amounting to 389 dollars, and 50 cents,) which, by their directions, were packed and sent to the house of the defendant, on the 6th of *October*, 1804, which, according to the entry in the plaintiff's book, was the day of sale. The defendant and *Le Blanc* told the plaintiff that the furniture was to be shipped to *Martinique*, and the defendant observed that *Le Blanc* was an alien, and that it could not be shipped in his name. *Le Blanc* was a stranger; the defendant lived in the city, and selected most of the articles. He told the plaintiff that he need not be afraid of *Le Blanc*, as he was very rich. *Le Blanc*, a short time after, absconded.

The plaintiff then offered to prove, that the defendant and *Le Blanc* had, about the same time, obtained goods from several other persons, on similar representations, which goods had passed into the possession of the defendant. This evidence was objected to by the defendant's counsel, but admitted by the judge. [This evidence, which it is unnecessary to state here, was detailed in the case, and related to transactions of the defendant and *Le Blanc*, about the 5th of *November*, 1804, and went to show a combination between them to obtain property fraudulently from two persons of the name of *Ross* and *Stollenwerck*.]

The plaintiff also proved, that on the 5th of *November*, 1804, *Le Blanc* made a general assignment to the defendant of his furniture, including the articles in question, for the consideration of 1,165 dollars, which was executed in the afternoon

of that day, when he absconded; but he was afterwards apprehended, and convicted of forgery.

NEW-YORK
May, 1808.

ALLISON
v.
MATTHEW

The judge charged the jury, that if they were satisfied from the evidence, that at the time *Le Blanc* obtained the furniture from the plaintiff, there was a combination between him and the defendant to defraud the plaintiff of his property, that then the property did not pass, and the plaintiff would be entitled to recover. That the falsehoods uttered by the defendant at the time of the purchase, and his getting the property into his own possession, were circumstances to show fraud; but if, on the other hand, the sale was fair at the time, and without any collusion between the defendant and *Le Blanc*, that then there ought to be a verdict for the defendant. The jury found a verdict for the plaintiff for the amount claimed by him.

A motion was now made to set aside the verdict and for a new trial.

1. Because the form of action was improper.
2. Because the evidence of subsequent acts of collusion and fraud between the defendant and *Le Blanc*, was inadmissible.
3. Because the verdict was against evidence.

Edwards and Baldwin, for the defendant. From the evidence given at the trial, this appears to be an action for a deceit rather than an action of trover. The defendant could not be expected, on a declaration in trover, to come prepared to meet allegations of fraud and deceit. The plaintiff, if he meant to have proceeded on such ground, ought to have brought an action on the case. The defendant is taken by surprise, from this mode of proceeding.

The transactions of the defendant and *Le Blanc*, with *Ross* and *Stollenwerck*, were four or five weeks subsequent to the purchase of the furniture of the plaintiff. Acts so remote and disconnected, can never be evidence of fraud *in a former transaction with another person. If intended to impeach the character of the defendant, it was improper. It could not be expected that he could anticipate such an attack, or that he should be prepared to meet it. The character of a party, unless put in issue, can never be impeached in this way, by going into evidence of all the transactions of his life.

[* 237]

Riker and Emmet, contra. Fraud will vitiate and avoid every act, however fair in appearance, and though clothed with the forms of law. (*Bac. Ab. tit. Fraud, A. Carth. 3, 4. 2 Inst. 108.*) If the property, at the time of the purchase, did not pass from the plaintiff, then trover is maintainable. The plaintiff may go into evidence of fraud to avoid the sale, and to show that the property did not pass. Fraud can never be covered and protected by the forms or process of law. After a regular sale and delivery of goods, if the vendor can show that they were obtained fraudulently, he may stop them *in transitu*. (*Hollingsworth v. Napier, 3 Caines, 183.*) An

NEW-YORK,
May, 1808.

ALLISON
v.
MATTHEW

[* 238]

action on the case, in the nature of *deceit*, will lie only against the vendor, who has practised some deception in the sale. *Trover* is the proper form of action to try the title to personal property. The defendant must always come prepared to show his own right to the goods, or that the plaintiff has no property in them. There is no pretence that the defendant is taken by surprise. In *ejectment*, as to real property, and in every other action which brings the title in question, the defendant must come prepared to meet it. If the plaintiff was at liberty to show that no property passed on account of the fraud, then the evidence given was admissible. It was proper to show a fraudulent combination between the defendant and *Le Blanc*, to obtain the possession of goods, by false representations, and under the form of a contract of sale. Fraud, in almost every case, is to be proved by circumstances. One fact is proved, from which an inference may be fairly made in relation to another fact. Thus in a criminal case, on an indictment for the forgery of a bank note, the prosecutor was allowed to give evidence of other forged notes having been passed by the prisoner, in order to show his knowledge of the forgery. (1 *Bos. & Pul. new series*, 92. *King v. Wylee*.) In the case of *Gibson v. Hunter*, (2 *Hen. Black.* 288.) which was on a bill of exchange, drawn by *A.* upon *B.* payable to a fictitious person, evidence was admitted of irregular and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.* payable to fictitious payees, and accepted by *B.*, in order to draw an inference that *B.*, at the time, knew the payee to be fictitious, or that, by having given a general authority to draw such bills, he had also authorized the drawing of the bill in question, though none of the transactions or circumstances had an apparent relation to the bill on which the action was brought. It is true, the general character of the party is not to be attacked by evidence in this way, but that was not the case. The evidence was introduced to show, from the conduct of the defendant and his connection with *Le Blanc*, an intention to deceive and defraud the plaintiff. The fact in issue is not proved by this evidence, but it serves to show the *quo animo*, the knowledge or intention of the party, from which every reasonable mind may infer the fraud or criminality.

The objection, that the verdict was against evidence, is addressed to the sound discretion of the court, which will derive little aid from the comments of counsel.

Per Curiam. The action is clearly maintainable. As fraud would vitiate and avoid the sale, it was competent for the plaintiff to go into evidence of the fraud. The question was, under what circumstances, and with what *intention*, the defendant acquired the possession of the property; or, in other words, whether the property passed from the plaintiff. For this purpose the evidence was admissible. It is not pretended

that it would not be good evidence against *Le Blanc*; and if so, it was admissible to show that the defendant was connected with him in the transaction, and privy to the fraud; and therefore had no right to the property of which he had thus obtained the possession. As to this being a verdict *against evidence, it would, perhaps, be enough to say, that the judge, before whom the cause was tried, was satisfied with it; but it appears to us, that the verdict is well supported by the evidence.

We are, therefore, of opinion, that the plaintiff must have judgment.

Rule refused.

NEW-YORK
May, 1808.

HYATT
v.
WOOD.

[* 239]

HYATT against WOOD.

THIS was an action of *trespass, assault and battery*. The cause was tried at the *Seneca* circuit, the 22d June, 1807, before Mr. Justice *Tompkins*.

The plaintiff and the defendant were in a meadow, which each claimed as his own, and each ordered the other to go out, when the defendant struck the plaintiff with a stick, and a scuffle ensued.

It was proved that one *Green* had executed a deed to the defendant, for lot No. 80, in *Junius*, including the meadow where the trespass was committed, and that he surrendered the possession to the defendant on the 1st March, 1805. It appeared that *Green* had held the lot under a lease, and that the plaintiff had occupied a dwelling-house in which *Green* had lived, during the months of *March, April and May*, 1805, and until the commencement of this suit.

It also appeared that *Green* had left the house in *February*, 1805, and that the defendant had put up some fences, and exercised other acts of ownership.

The judge charged the jury, that if, at the time of the assault and battery, the defendant had not only the right of possession, but the actual possession of the lot, on which the assault was committed, the defendant was justified in using as much force as was necessary, to prevent the plaintiff from trespassing upon him, and if the force or violence used, was no more than was necessary for that *purpose, they ought to find a verdict for the defendant; that, in his opinion, the defendant had the right of possession, but not the actual possession, which by the evidence appeared to be in the plaintiff, though without the

In an action of assault and battery, where the injury was trifling, and the jury found a verdict for the defendant, a new trial was refused, notwithstanding the misdirection of the judge. (a)

[* 240]

(a) See the remarks upon this case, 5 *Wend. Rep.* 586, 587. See also *Fowler v. Whipple*, 8 *Johns. Rep.* 369. *Cady v. Fairchild*, 18 *Johns.* 129.

NEW-YORK,
May, 1808.

HYATT
v.
WOOD.

assent or privity of the defendant, and under a claim of title adverse to his ; that the fact of the right of property and title of the defendant, under such circumstances, was sufficient to justify him in entering upon the possession of the plaintiff, and using such force as was necessary to expel the plaintiff.

The jury, accordingly, found a verdict for the defendant.

A motion was made to set aside the verdict for the misdirection of the judge.

Hopkins, for the plaintiff. The pleadings in this case are not stated, but it will be enough to show that the jury were misdirected. It is not denied that a person, having a right of entry, may enter on land to preserve his right ; but he cannot enter on the peaceable possession of another, and turn him out.

KENT, Ch. J. I do not suppose that the defendant's counsel will contend for such a doctrine.

SPENCER, J. The damages appear to have been trifling, and this court have decided, that where a cause is of a trivial nature, a new trial will not be granted, merely for the misdirection of the judge.

Hopkins. Here the jury have been prevented, by the direction of the judge, from saying whether the damages were great or small. In a case of *tort*, the court will not presume what the damages were. Besides, it is apparent from the case, that the peaceable possession of the freehold, on which its value may depend, was the matter principally in question, and the damages, therefore, would probably have been considerable.

Riker, contra, was stopped by the court.

[* 241] *Per Curiam*. If this had been an action *quare clausum fregit*, in which the right to the freehold came in the question, *there might be some reason for granting a new trial. But for an assault, by which the party has sustained little or no injury, there seems to be no sufficient ground for the court to interfere. It has frequently been decided in this court, that in cases where the damages are trifling, a new trial will not be granted after a verdict for the defendant, merely to give the plaintiff an opportunity to recover nominal damages, and when no end of justice is to be attained by it, though there may have been a misdirection of the judge. (*Goodrich v. Walker*, January term, 1800. *Brantingham v. Fay*, April term, 1800. *Malin v. Brown*, January term, 1803.) The principle stated by the judge in this case was incorrect ; but the action is of too little importance to grant a new trial merely for that reason. The plaintiff may

discontinue without paying costs, provided no other suit be brought for the same cause.

Rule refused. (a)

NEW-YORK,
May, 1863.

CRUGER
v.
CROPSKY

(a) See 2 *Tidd, K. B. Prac.* (2d ed. 812.) In *Wilson v. Rastall*, (4 *Term*, 753.) Lord Kenyon said, "There is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion: So, too, in ordinary, where the damages are small, and the question too inconsiderable to be re-tried, the court have frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the court have ever refused to grant a new trial."

*CRUGER against CROPSKY.

[* 242]

THIS was an action of *assumpsit* on a promissory note made by the defendant to the plaintiff. The declaration was filed as of May term, 1806, to which the defendant pleaded *non assumpsit*. Continuances were entered to August and November term, 1806, when the defendant put in a plea *puis darrein continuance*, as follows, to wit: "And the said defendant comes and says, that the said plaintiff ought not further to maintain his said action against the said defendant, because he says, that since the last continuance of the plea between them, to wit, after the first Monday in August, 1806, from which day the said parties were last continued here to the second Monday of November, to wit, on the 8th day of November, in the year last aforesaid, at the city of New-York, he, the said defendant, being then an insolvent debtor, and having conformed in all things to the directions of the act of the legislature of the state of New-York, entitled 'An act for giving relief in cases of insolvency, passed the third day of April, 1801;' by virtue of the said act, did obtain, by order of the honorable Brockholst Livingston, Esquire, one of the justices of the Supreme Court of Judicature of the state of New-York, in pursuance thereof, a discharge from all the debts due by him, the said defendant, on the 8th day of November, 1806, and contracted for before that time, though payable afterwards, as in and by the said discharge, under the hand and seal of the said Brockholst Livingston, relation thereto being had, will more fully appear; and the said defendant avers that the promise and undertaking, in the bill of the said plaintiff mentioned, was made before the eighth of November, 1806, to wit, on the day and year in the said bill mentioned, and this he is ready to verify, wherefore he prays judgment," &c. To this plea there was a special demurrer and joinder. The causes of demurrer assigned were, 1. That there was no *profert* or *oyer* given of the discharge. 2. That it did not aver that the discharge was granted by the justice, nor that the judge or

A plea *puis darrein continuance* of a discharge, under the insolvent act, stating generally, that the defendant, being an insolvent debtor, and having in all things conformed to the directions of the act, in pursuance thereof, on such a day, obtained his discharge, &c., is bad. The discharge, at least, ought to be set forth in the plea.

[* 242]

NEW-YORK,
May, 1868.

FINK
v.
BRYDEN.

justice was authorized to grant the same, nor did it show or set forth how, or in what manner the defendant had conformed all things to the act, nor did it appear from the said plea that had conformed to the act, nor that it had been so determined, that it so appeared to the judge. 3. That the plea ought to have set forth the discharge or the contents thereof.

J. Radcliff, in support of the demurrer. In the case *Service v. Heermance*, (1 Johns. 91.) the discharge of the instrument, which recited all the proceedings in relation to the instrument, was set forth *verbatim*, which seems to be the least that the court will require. In the present case, there is a mere reference to the discharge. As it was an instrument under seal there ought, at least, to have been a *profert* of it.

Baldwin, contra. A *profert* cannot be necessary in a case like the present. It is required only where there is a deed executed by the party, of which a *profert* is made, in order that it may be seen to be the same deed. A *profert* would not aid the plaintiff, who might have replied that there was no such discharge. The substance of the discharge is set forth; it is in the nature of a release, and you need not set forth a release *verbatim*; it is enough to state it substantially. Again, the discharge is a matter of record, to which the plaintiff may resort, so there was no necessity of setting it forth *verbatim* in the plea.

Per Curiam. The plea is clearly bad; but the defendant has leave to amend on payment of costs.

Judgment for plaintiff.

[* 244]

*FINK against BRYDEN.

Thursday,
May 5th.

Where a motion is made to set aside an inquest taken by default, the affidavit must state, that an inquest was taken by default in the cause. Where an attorney misapprehends the rule of practice, the court will permit him to give new notice of a motion for a subsequent day in term, on new affidavits.

JOHNSON, for the defendant, moved to set aside the inquest taken by default in this cause, on the usual affidavit of merits. He produced a certificate of the clerk of the sittings, that the inquest had been taken by default, out of its order on the calendar of causes.

Slosson, contra, objected, that no copy of the certificate of the clerk had been served on the plaintiff, and that the affidavit did not state that an inquest had been taken by default, nor that it was taken out of its order on the calendar.

Johnson, in reply, observed, that the notice of the motion to the plaintiff's attorney, was to set aside the inquest taken by default in the cause; that the plaintiff's attorney must know that

it was taken out of its order, and that the certificate was merely to satisfy the court as to that fact.

NEW-YORK,
May, 1808.

FINK, jun.
v.
BRYDEN

Per Curiam. The affidavit of the defendant ought to state, that an inquest was taken by default in the cause. The certificate of the clerk cannot be received, unless a copy of it has been served on the opposite attorney. But as there appears to have been some misapprehension by the attorney for the defendant, as to the practice, he may give new notice, and make his application again at the last non-enumerated day in this term.

N. B. The application was renewed, on the last non-enumerated day, on a new affidavit, upon which the court granted the rule.

Rule granted.

*FINK, jun. against BRYDEN.

[* 245]

JOHNSON, for the defendant, moved to set aside the inquest taken in this cause, on an affidavit of the defendant, that the inquest was for more than was due to the plaintiff, and that the defendant had a good, legal and substantial defence on the merits.

R. Bogardus, contra, objected that the affidavit was defective in the same points as were mentioned in the preceding cause; and that the defendant had assigned a reason for swearing to a defence, that more damages had been assessed than were really due, which he said could only be a few cents in the calculation of interest; and he offered to remit whatever had been included more than was due.

Per Curiam. For the reason assigned in the former cause, the defendant may renew his application on the last non-enumerated day, and by a new affidavit can explain whether the cause stated is the sole ground of his affidavit of merits.

On the last non-enumerated day, the application was renewed, on an affidavit stating, that an inquest had been taken by default in the cause, and out of its order on the calendar, and the usual affidavit of merits. But *the court* said, that it was insufficient, as the defendant was required to explain the ground of his defence; but they would give further time for that purpose before the rising of the court. The defendant afterwards produced a further affidavit explaining the grounds of his defence, which *the court* said was sufficient, and thereupon granted the motion.

Where the defendant, on an affidavit of merits, to set aside an inquest taken by default, stated also that the verdict was taken for more than was due, and the opposite party offered to relinquish the surplus, the court refused the motion, but gave the defendant until a subsequent day in term, to produce a further affidavit to explain the former, as to his defence on the merits; and on such further affidavit, the motion was granted.

Rule granted.

NEW-YORK
May, 1808.

CARMER
v.
WEEKS.

*CARMER *against* WEEKS and TOMPKINS, Bail of
STAGG.

There need not
be *eight* days
between the
teste and return
of a *ca. sa.* to
charge bail,
where the pro-
ceedings are not
by original writ.

J. STRONG moved to set aside the proceedings against the defendants in this cause, for irregularity. He read an affidavit, stating that the judgment in the original cause was entered on the 6th day of *February* last, that a *ca. sa.* was issued on the same day, tested the 4th day of *February*, which was the fourth day of the term, and returnable on the 11th. On the 12th of *February*, the *ca. sa.* was returned *non est inventus*. It did not appear how long it had lain in the sheriff's office. A *capias ad respondendum* against the defendants, as bail, was served on the 13th of *February*, (the last day of the term,) in the afternoon, after the clerk's office was shut, so that the principal could not be surrendered on that day. The proceedings were afterwards stayed by an order of a judge, until the second *Monday* of this term.

The counsel contended, that by the act concerning writs of error, &c. (*Rev. Laws*, v. 1. p. 200. § 6.) in all proceedings by original, there must be 15 days between the *teste* and return of the *ca. sa.*; or if the proceedings are by bill, according to the *English* practice, there should be 8 days between the *teste* and return. He cited 1 *Sell. Prac.* 550. *Salk.* 601, 602. *Ld. Raym.* 1177. 1 *Black. Rep.* 74.

D. B. Ogden, contra. This point was expressly decided in the case of *Cook and others v. Campbell & Lorraine*. (3 *Caines*, 322.)

KENT, Ch. J. Though the court in that case intimated the opinion stated, yet it was reconsidered on a further argument the next day, and the point was not finally decided. The question is still open.

Ogden. The only question is whether the *English* rule of practice as to 15 or 8 days between the *teste* and return of a *ca. sa.* to charge bail, is to be adopted. In the present case, the proceedings were by bill.

[*247]

**Per Curiam*. There is no rule of practice established in this court, requiring eight days between the *teste* and return of a *ca. sa.*, nor do we see any reason which should render such a rule necessary.

Rule refused.

NEW-YORK
May, 1808.DEVOY *against* BOYER.MERCER
v.
SAYRE.

THERE were three suits between the plaintiff and the defendant in this court. The first was on a promissory note, in which the plaintiff recovered damages. The second was on a contract, in which the plaintiff also recovered damages. In the third suit, there was a verdict for the defendant.

J. Strong, for the defendant, now moved to set off the entire damages recovered by the defendant in the last suit against the amount recovered in the two other suits. He stated that the defendant was insolvent.

D. B. Ogden, contra, said, that the plaintiff had no objection to the set-off, provided the costs of suit in the two first causes were paid.

Per Curiam. The costs of the attorney for the plaintiff in the two first suits must be paid; he has a *lien* for them, which ought not to be affected by the set-off. It was so decided in the case of *Cole v. Grant*, (2 *Caines*, 105.) and that must govern our decision in the present case.

Where there were three suits between the same parties, and the plaintiff recovered against the defendant in two of them, and the defendant against the plaintiff in the other, the damages recovered in the last suit, were allowed to be set off against the two other suits, but not against the costs. (a)

(a) See *Simson v. Hart*, 15 *Johns*. 70

*MERCER *against* SAYRE, impleaded with TOLER.

[* 248]

D. B. OGDEN, in behalf of the plaintiff, moved that the defendant deliver to the plaintiff's attorney, the particulars in writing of the matters mentioned in the notice of set-off accompanying his plea.

This was an action of *assumpsit*, to which the defendant pleaded *non assumpsit* and payment, and gave notice that he intended to set off, at the trial, several large sums of money due to him for goods sold and delivered, work and labor, money had and received, paid, laid out, &c. in general terms.

To show the *English* practice on this subject, he cited *Tidd*, (2d ed.) 508—511.

Baldwin, contra, objected, that this was an attempt to introduce a new point of practice, which would prove extremely inconvenient, as the party would be bound by the precise particulars delivered, and any variation would expose the plaintiff on the one hand to be nonsuited, and the defendant on the

When the defendant pleads payment, and gives notice of a set-off in general terms for goods sold and delivered, money paid, &c. the plaintiff may require him to specify and deliver the particulars of the set-off; and where the particulars of the plaintiff's demand are not set forth in his declaration, the defendant may require him to state the particulars.

NEW-YORK, other, in case of a set-off, to be defeated. (3 *Burrow*, 1390.)
May, 1808. It might also be abused for the mere purpose of delay.

QUIN
v.
RILEY.

Per Curiam. We have formerly decided, that the defendant had a right to call on the plaintiff for the particulars of his demand, where they are not disclosed in his declaration. Equal justice seems to require that the plaintiff, also, should be allowed to demand of the defendant, the particulars of his set-off, when they are not specified in the notice. The plaintiff may take his rule, that the defendant deliver to the plaintiff's attorney, an account in writing of the particulars of his set-off, within twenty days, or that, in default thereof, he be precluded from giving evidence at the trial in support of the same.

Rule granted.

[* 249]

*PHŒNIX, Administrator, *against* HILL.

Where an executor or administrator brings a wrong action, by mistake, the court will allow him to discontinue without costs.
(a)

THIS was an action brought on a decree of a court in *Scotland*. The writ was returned at the *November* term, in 1806, and the defendant was discharged on common bail, the plaintiff not being able to show a sufficient cause of action. A rule was afterwards entered for the plaintiff to declare, and he now applied for leave to discontinue without payment of costs.

Per Curiam. There is no evidence that the administrator, knowingly, brought a wrong action, and we are not to presume it. We are, therefore, of opinion that he ought to be allowed to discontinue without the payment of costs.

Rule granted

(a) *Morae v. McCoy*, 4 Cow. Rep. 551.

QUIN *against* RILEY.

Counter-affidavits may be read as to the sufficiency of an excuse, for not giving notice of a motion for the first day of term.

COLDEN, for the defendant, moved to set aside the inquest taken in this cause, on the usual affidavit of merits. He also read an affidavit, explaining the reason why a notice of the application for the first day of the term had not been given.

T. A. Emmet, contra, offered a counter-affidavit as to the reasons assigned for not making the application earlier.

Colden objected, that by the practice of the court, no counter affidavits could be received :

NEW YORK,
May, 1808.

KLEECKE
v.
STYLES.

But *the court* said, that the rule about counter affidavits applied only to the question of a defence on the merits, and not as to the sufficiency of the excuse for not giving notice of the application for the first day of the term.

Emmet then read the counter affidavit.

Per Curiam. We think the excuse was sufficient. The defendant must take his rule.

Rule granted.

*HEWITT *against* FITCH.

[* 250]

HOPKINS, for the defendant, moved to set aside a judgment which had been entered upon a warrant of attorney, on the ground of usury, which was disclosed in the defendant's affidavit.

An issue to try the fact of usury, on a judgment, will not be awarded, unless the usury be denied, or the fact is put in doubt

Edwards, contra, said, that the proper course was to award an issue to try the fact of usury. (*Starr v. Schuyler*, ante, 139.) He offered no counter affidavit.

Per Curiam. When the fact is put in doubt, we award an issue, which is merely to inform the conscience of the court. But where the usury is not denied, nor any doubt suggested, there can be no occasion for that proceeding.

Rule granted.

KLEECKE *against* STYLES.

FISK, for the defendant, moved to set aside the default and all subsequent proceedings in this cause, for irregularity. He read an affidavit stating, that on the 7th *March* last, the defendant's attorney gave due notice of his being retained as attorney for the defendant, and also a notice that special bail had been put in, and that the bail-piece was filed in the clerk's office at *Albany*, on the 4th *March*.

Where the copy of the declaration and notice to plead are served upon the defendant personally, and he afterwards employs an attorney, who gives notice of his retainer, the declaration and rule to plead need not be the first notice.

D. B. Ogden, contra, read an affidavit, that a copy of the

served *de novo* on the attorney; but he must plead in 20 days after the service of

NEW-YORK,
May, 1808.

BIAYS
v.
MERRIHEW

declaration, with notice of a rule to plead, was served on the defendant *personally*, on the 4th day of *February*, before any notice of a retainer by the defendant's attorney, and that the default was regularly entered, after the expiration of the 20 days.

Per Curiam. Where a copy of the declaration and notice of the rule to plead, have been served on the defendant *personally*, and the plaintiff's attorney, afterwards, receives notice of a retainer from an attorney for the defendant, he need not serve a copy of the declaration, or notice of the rule to plead, *de novo*, on the defendant's attorney; *but the defendant is bound to plead in 20 days from the first notice. It was so decided in *July* term, 1802, in the case of *Hallett v. Moore*, and which was a case of bail. It is otherwise, where the service of the declaration and notice is by putting them up in the clerk's office. (See the 5th rule of *April* term, 1796.)

[* 251]

Rule refused.

BIAYS *against* MERRIHEW.

Objections to commissioners named to take the examination of witnesses abroad will not be received upon mere suggestion, but there must be an affidavit of the grounds of objection.

HOPKINS moved for a commission to take the examination of witnesses, in this cause, residing at *Baltimore*. The commissioners were named in the notice.

J. Radcliff, contra, suggested that one of the commissioners named, was an agent of the plaintiff, and might be so far interested as to render him unfit to be a commissioner.

Per Curiam. The court will not receive the objection, on a mere suggestion of counsel. You must produce an affidavit to satisfy the court, that there are reasons for believing that either of the commissioners will not be disinterested or impartial.

Rule granted.

NEW-YORK
May, 1808.

OAKLEY

v.

STEDDIFORD.

*HACKLEY, Survivor, &c., against HASTIE and PATRICK.

WELLS, in behalf of the defendants, moved to set aside the verdict given for the plaintiff in this cause, for irregularity. He read an affidavit, stating that at the trial of the cause, the jury, when they went out to consider of the verdict, took with them a commission for the examination of certain witnesses, with the interrogatories and depositions annexed, a paper attached to which had been read in evidence on the trial of the cause, and that no consent of the counsel was given for the purpose. He cited *Cro. Eliz.* 189. 1 *Sid.* 235.

If the jury take a paper out with them, when they deliberate on their verdict; but never look at it, the verdict will not be set aside on that account. (a)

Colden, contra, read the affidavits of three of the jurors, who tried the cause, that the papers mentioned were not read by the jury; and that the only question on which they had any doubt, was relative to a set-off of a sum due to *Hastie* alone. He cited *Trials per pais*, 248. 257. *Viner, Trial*, 472. *Bulwer's N. P.* 308.

Per Curiam. The decisions on this subject to be found in the books are contradictory. Some of the ancient cases are very strict; but of late years, courts have been inclined to be less rigid, and to decide according to the real justice of the case. If the jury have never looked at the papers, nor have been influenced by them, there can be no just cause for setting aside the verdict. This is very different from the case of *Metcalf v. Deane*, cited from *Croke*, where one of the witnesses recited his evidence to the jury, after they had retired to consider of their verdict.

Rule refused.

(a) 17 *Johns.* 323. *Smith v. Thompson*, 1 *Cow. Rep.* 221, and the reporter's note.

*OAKLEY against STEDDIFORD and MARSCHALK.

[* 253]

THE defendants in this cause pleaded separately, and an inquest was taken by default against both of them at the last sittings in *New-York*.

Wells, in behalf of *Marschalk*, now moved to set aside the inquest. He read an affidavit that the defendants had pleaded separately, and that the defendant *Marschalk* had a good de-

On a motion to set aside an inquest by default against two defendants, one having previously been discharged as an insolvent, the court refused the rule upon the plaintiff's discharge, &c.

stipulating to enter a verdict for the defendant who was

NEW-YORK,
May, 1808.

HACKLEY
vs.
HASTIE.

fence on the merits. It appeared that he had been regularly discharged under the insolvent act.

R. Bogardus, contra, offered to stipulate not to proceed against *Marschalk*, and that a verdict might be entered for him on the *postea*.

Per Curiam. On the offer of the plaintiff, to have a verdict entered for the defendant *Marschalk*, we see no reason for setting aside the inquest, as he, by the offer, will have the full benefit of his discharge. On condition, therefore, that the plaintiff performs his stipulation in ten days, we refuse the rule.

Rule refused.

HACKLEY against HASTIE and PATRICK.

Where a judge's order has been obtained to stay proceedings on a verdict, the party in whose favor the verdict was given, may, nevertheless, enter a rule *nisi* for judgment on the fourth day of the next term.
(a)

AFTER a verdict for the plaintiff in this cause, at the last sittings, the defendants obtained a judge's order for the stay of proceedings, which was regularly served before the term. The plaintiff's attorney, notwithstanding the order, filed the *postea* on the fourth day of term, and entered a rule for judgment, *nisi*, &c.

Wells, for the defendants, now moved to vacate the rule entered, on the ground, that after the service of the order to stay proceedings, no further step could be taken in the cause.

Colden, contra. The entry of a rule *nisi* was regular. It cannot prejudice the defendants; for no judgment is entered up; and in case the verdict is set aside, the rule will be a mere nullity. If the party is not allowed to file *his *postea*, and enter the rule conditionally, he may be delayed a term where the motion for a new trial is decided at *Albany*, or so late in term, that there is not time for the rule for judgment to be entered, or to expire.

Per Curiam. The entering of a rule *nisi* for judgment cannot prejudice the defendant, and if not done on the fourth day of term, may produce inconvenience to the plaintiff, in case a new trial should be refused. No judgment can be entered up, until the motion for a new trial is decided.

Rule refused

[* 254]

(a) See *Moran v. Dawes*, 4 Cow. Rep. 22.

NEW-YORK,
May, 1808.LIVINGSTON *against* The Executors of LIVINGSTON.LIVINGSTON
v.
LIVINGSTON.

THE declaration in this cause contained several counts. The first was a special count for a legacy, and the others were the usual money counts. The plaintiff entered an interlocutory judgment for want of a plea, and damages were separately assessed on each count. On the last day of the last term, a motion was made and argued in arrest of judgment, but remained undecided until this term, when judgment was arrested on the first count. (See *ante*, p. 189.)

Where there was a special count, and several money counts in a declaration, and after interlocutory judgment for want of a plea, damages were separately assessed on each count, and judgment was arrested on the first count, the inquisition on the other counts was set aside, and the defendant allowed to plead upon terms.

Hoffman, for the defendants, now moved to set aside the inquisition taken on all the other counts, and for leave to plead to them. He read an affidavit, stating that the plaintiff had no other cause of action against the defendants, than what was stated in the first count, the money counts being added as matter of course, and not because the plaintiff had distinct causes of action, and that he was not informed that damages were separately assessed on the several counts, until after the last term. He contended, on the ground of merits, and of surprise, and as this was a case of executors, one of whom was absent in *Europe* when the suit was commenced, and still is absent, that the inquest ought to be set aside.

E. Williams and *J. Radcliff*, contra.

**Per Curiam.* The defendants may take their rule to set aside the inquest, on the following terms: to pay the costs, not to plead the statute of limitations, but issuably, and to take short notice of trial, and consent that the *venue* be changed into such county as the plaintiff may elect for the trial of the cause.

[* 255]

Rule granted.

NEW-YORK,
May, 1808.

BUNN
v.
HOYT.

BUNN, Survivor, &c. Assignee of GRAHAM, *against*
HOYT, Survivor, &c.

A verdict will not be set aside, on the ground of newly discovered evidence, merely to give the party an opportunity to impeach the credit of the witnesses sworn at the trial. Where a jury deliver a sealed verdict to the court, and on being polled, one of them disagrees to the verdict, the judge may send the jury out again to agree on their verdict.
(a)

RIKER moved to set aside the verdict in this cause for irregularity, and for a new trial, on the ground of material evidence discovered since the trial. From the affidavits which were read, the following facts appeared: This was an action of *assumpsit* against the defendant, as the agent of *Graham* in the sale of a ship. The cause was tried at the last sittings in *New-York*, before Mr. Chief Justice *Kent*.

After the charge of the judge, the jury retired from the bar to consider of their verdict, and after being together several hours, they separated, and the next morning delivered to the court a verdict sealed up for the plaintiff. When the verdict was read, the counsel for the defendant requested that the verdict might be taken by the *polls*, and one of the jurors, on being asked whether he agreed to the verdict as read, said that he could not agree to it; that he had signed the sealed verdict as a matter of accommodation, but he thought it unconscientious, and could not assent to it. The judge then directed the jury to retire, and reconsider their verdict, to which the defendant's counsel objected; but the jury were sent out, and after being absent for some time, they gave information to the court that they could not agree on their verdict, upon which they were informed, by the direction of the judge, that they must agree. After having been out several hours, they returned with a verdict for the plaintiff for the same damages as before.

[* 256]

The newly discovered evidence went to impeach the credit of the material witness for the plaintiff on the trial.

To show that the verdict was irregularly taken, the counsel cited *Trials per pais*, 249. 310. 2 *Salk.* 645. 2 *Tidd*, 817.

Hopkins and *J. Radcliff*, contra, were stopped by the court, as to the first point. As to the other ground, they observed, that verdicts were never set aside, merely to let in evidence to impeach the testimony given at the first trial. It should be newly discovered evidence of some material fact not before shown to the jury.

Colden, in reply, said, that though, on an application for a new trial, you cannot object to the competency of the witnesses who have been sworn on the former trial; yet there is no reason why you may not show, by newly discovered evidence, that the witnesses swore falsely.

(a) *Douglass v. Tousey*, 2 *Wend. Rep.* 352.

Per Curiam. There has been no irregularity shown to render it proper to set aside the verdict; nor does the affidavit of newly discovered evidence disclose sufficient to support the application for a new trial. A verdict is never set aside to give the party an opportunity of impeaching the credit of witnesses sworn at a former trial. The evidence should be of some material fact, which would induce the belief, that if proved to the jury, it would so far influence their minds, as to produce a different verdict.

NEW-YORK,
May, 1808.

HARRIS
v.
WADSWORTH.

Rule refused.

*HARRIS *against* WADSWORTH.

[* 257]

THIS was an action of covenant, upon a covenant of seisin in a deed.

Amendment of
the declaration,
by adding a
new count, in
covenant.

P. W. Radcliff, for the plaintiff, moved to amend the declaration in this cause, by adding certain words mentioned in the notice, and also a new and distinct count, upon the covenant for quiet enjoyment, contained in the deed.

Hopkins, contra, read an affidavit, stating that pleas were put in, in *September*, 1806, to which the plaintiff demurred, and the defendant joined in demurrer; that the demurrer was noticed for argument in *November* term, 1806, at which term, on notice of a motion to that purpose, the plaintiff, by leave of the court, withdrew the demurrer, on payment of costs; but has not since replied, or taken any step in the cause, except to give notice of the present motion. He cited *Sackett v. Thompson*, (2 *Johnson*, 206.)

Per Curiam. The case of *Sackett v. Thompson* was much stronger than the present. The court have a liberal discretion in regard to amendments, and we think it reasonable in this case, that the motion should be granted.

Rule granted.

NEW-YORK,
May, 1808.

BRIGGS
v.
BRIGGS.

ROB and NEILSON *against* MOFFAT.

Where a writ was served on Sunday, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded, and obtained judgment by default and execution, the court ordered all the proceedings to be set aside, with costs, on condition that no action should be brought against the sheriff for a false imprisonment.

ROOT, for the defendant, moved to set aside the judgment and execution in this cause, for irregularity. He read an affidavit stating that the deputy of the sheriff, to whom the *capias ad respondendum* was directed in the cause, called on the defendant on the Sunday preceding the second Monday of November last, and asked the defendant whether he would consent to a service of the writ on that day, which was objected to; and that no writ was served on the defendant before or after that day. That supposing the writ would of course be returned *non est inventus*, the defendant paid no further attention to the cause, nor did he know of any proceedings until he was served with an execution.

I. V. D. Scott, contra. The truth or falsity of a return is not to be tried by affidavit. The defendant ought to seek his remedy by an action against the sheriff for a false return.

Per Curiam. The defendant may take a rule to set aside the judgment and execution, with costs, provided he stipulates not to bring an action against the sheriff for a false imprisonment.

Rule granted.

BRIGGS *against* BRIGGS, Administrator of BRIGGS.

An affidavit of the defendant's attorney, stating that "he was informed and verily believed that the defendant had a substantial defence on the merits," is not sufficient to set aside a default entered in the cause.

GRIFFIN, for the defendant, moved to set aside the default, on an affidavit of the attorney for the defendant, that "he was informed and verily believed the defendant had a good and substantial defence upon the merits."

H. Bleeker, contra.

Per Curiam. The affidavit is not sufficient. It does not state that the attorney derived his information from the defendant or from his counsel, nor from whom it was obtained. The rule must be denied.

Rule refused

NEW-YORK
May, 1808.

DAVIS

v.

GRAINGER

***JACKSON, ex dem. AIKINS and others, against
BANKCRAFT.**

E. WILLIAMS, for the defendant, moved for a commission to take the examination of witnesses; and also to strike out the names of *Rogers* and *Aikins*, two of the lessors of the plaintiff, on an affidavit stating that they were dead.

Hopkins, contra, objected, that the cause was not stated to be at issue; and read an affidavit, that *Aikins*, one of the lessors of the plaintiff, alleged to be dead, was believed to be living.

Per Curiam. The rule for a commission must be denied; but we grant the rule to strike out the name of *Rogers*, one of the lessors of the plaintiff. The practice of inserting the names of persons as lessors of the plaintiff in ejectment, unnecessarily, is often abused, and ought to be restrained. And, considering the remote situation of the attorney of the plaintiff, we grant him leave until the next term, to produce a further affidavit as to *Aikins*.

A rule for a commission is not granted until after issue joined in the cause. Where the names of persons who are dead are inserted as lessors of the plaintiff in an action of ejectment, the court will order them to be struck out of the declaration

Rule refused.

**DAVIS against GRAINGER, Manucaptor,**

HOPKINS, for the defendant, moved to set aside the default and subsequent proceedings in this cause. It appeared that a rule had been obtained at the last term, to stay the proceedings against the defendant, on the bail-bond, upon the usual terms of paying costs and pleading issuably. The defendant pleaded the general issue, and also that the plaintiff had previously commenced another suit for the same cause of action, which was pending in *this court. The second plea was in the form of a plea in bar, and concluded with a verification.

Where a rule has been granted upon condition of pleading issuably, and the defendant pleads the general issue, and also that another action for the

[* 260]

same cause had been previously commenced, and was pending, the second plea, though pleaded in the form of a plea in bar, was held to be in abatement, and not an issuable plea, and so far vitiated the first plea,

H. Bleecker, contra, contended, that the second plea, though in the form of a plea in bar, was in fact a plea in abatement; and by adding a plea in abatement, the first plea was vitiated, so as not to be a compliance with the condition of the rule to plead issuably. He cited 3 Term, 305. 2 Lev. 197.

Per Curiam. The second plea is not an issuable plea, ac-

as not to be a fulfilment of the condition of the rule.

NEW-YORK
May, 1808.

CHARLES
v.
STANSBURY.

cording to the meaning of the rule, in whatever form it may be pleaded. It is clearly a plea in abatement. Besides, the rule was granted as a favor, and the conditions of it are to be strictly performed.

Rule refused.

THOMPSON and COLES, Assignees of BENNET and
others, *against* PARKER.

Where referees appointed by a rule of the court refuse to make a report, the proper course is to proceed by attachment against them.

R. BOGARDUS, for the defendant, moved to vacate the rule of reference in this cause, on an affidavit, stating that the referees had met and heard the parties, and agreed upon an award; but though often requested to make up and sign a report, they had refused to do so.

Colden, contra. The referees, being appointed by the court, may be compelled, by attachment, to make a report, which is the proper course of proceeding.

Per Curiam. The proper course to compel the referees to report, is to proceed by attachment. The motion must be denied.

Rule refused.

[* 261]

*CHARLES *against* STANSBURY.

Service of a notice on *Thursday*, of an intended motion on *Monday* following, is sufficient.

A NOTICE in this cause had been served on *Thursday*, of an intended motion to be made on the *Monday* following, being the first day of term. It was objected, that the last day being *Sunday*, there was not a four days' notice. But *the court* said, that *Monday* may be considered as the last day; that such a notice had always been held sufficient, and that in all notices, one day was to be taken inclusive, and the other exclusive.

Talbot, for the plaintiff.

Johnson, for the defendant.

Rule granted.

NEW-YORK,
May, 1808.Attorney's cer-
tificate of clerk-
ship.

ON the application of *A. B.* to be admitted to an examination as an attorney of this court, the certificate of clerkship by the attorney was, that the clerk "had regularly pursued the study of the law, under his direction and superintendence," &c. *The court* said that the certificate was insufficient; that the attorney ought to certify that the clerk has served his clerkship, regularly, *in the office of such attorney.* (a)

(a) Mr. Justice THOMPSON was absent during the whole of this term, from indisposition.

END OF MAY TERM.

203

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, IN THE THIRTY-THIRD YEAR OF OUR
INDEPENDENCE.

RUGGLES *against* KEELER.

In an action of *assumpsit*, brought in this state, the defendant may set off demands against the plaintiff, arising when both parties

[* 264]
resided in the state of Connecticut, and which, if sued for there, would be barred by the statute of limitations in that state, provided six years have not elapsed since the plaintiff came into this state.

(a) The saving in the statute of limitations extends to foreigners or those who have resided altogether out of the state, as well as to citizens of the state, who may be absent for a term of years.

THIS case came before the court on a return to a writ of *error* to the *Dutchess* Common Pleas. *Keeler* declared against *Ruggles* in the court below, on a promissory note given by *Ruggles* to *Keeler*, for 84 dollars and 34 cents, payable on demand, and dated the 4th April, 1803. There were also counts for money lent, money paid, and money had and received to the use of the plaintiff. *The defendant pleaded *non assumpsit*, with notice that he would give in evidence that the note was, on the 28th March, 1806, assigned to one *Walker Lewis*, and that said *Walker Lewis* was indebted to the defendant in the sum of 150 dollars, for work and labor, &c., and for goods sold, &c., and for money lent, &c., and for money had and received, &c., which sums the defendant would set off, &c.

On the trial, in June, 1807, the plaintiff below proved the note, which was payable to *Keeler*, but not expressed to be payable to his order. The defendant proved that the note had been sold to *Walker Lewis*, and was his property at the commencement of the suit, and that *Walker Lewis* was an inhabitant of the state of Connecticut; and that *Ruggles*, the

(a) See *Lodge v. Phelps*, 1 Johns. Ca. 139. *Scoville v. Confield*, 14 Johns. 338. *Raymond v. Wheeler*, 9 Cow. Rep. 296, and the cases cited in the opinion of Strobbs, Senator, S. C. 5 Cow. Rep. 231. See also *Andrews v. Heriott*, 4 Cow. Rep. 503, and the note. *Walters v. Adams*, 2 Cow. Rep. 626. *Fanning v. Consequa*, 17 Johns. 511.

defendant, had resided in this state since the 1st day of *April*, 1802, previous to which time he had always resided in *Connecticut*. The defendant then offered to prove, that between *February*, 1796, and *March*, 1797, he had rendered services for *W. Lewis* to the value of 133 dollars, and that in *January*, 1797, he sold goods to him to the value of 68 dollars. But this was objected to, on the ground that it was more than six years since a right of action accrued to the defendant to recover these demands; and it was shown, that by the statute of limitations of *Connecticut*, the defendant could not enforce those demands in that state after six years, and that those demands must be barred by the statute of limitations of *Connecticut*, and of this state. The court below decided that the evidence was inadmissible. A bill of exceptions was tendered to this opinion, and upon this bill of exceptions, *Ruggles*, the defendant below, brought his writ of error to this court.

ALBANY,
August, 1808.

RUGGLES
v.
KEELER.

P. Ruggles, for the plaintiff in error. The evidence to show that *Lewis* was indebted to *Ruggles*, ought not to have been rejected. *Lewis* was an inhabitant of the state of *Connecticut*, and never resided in this state. By the proviso of the statute of limitations of this state, (*Laws of N. Y.* v. 1. p. 561. sect. 5.) where a debtor is out of the state, the right of the creditor to *bring his action is saved, until six years after the return of the debtor to the state.

[* 265]

In the case of *Nash v. Tupper*, (1 *Caines*, 402.) it was expressly decided, that where parties were sued in this state, the court would not regard the statute of limitations of another state where the contract was made, but would be governed by our own statute of limitations; that the *lex loci contractus* applies only to the construction or interpretation of the contract, but that the remedy must be prosecuted according to the law of the country in which the action is brought. The same principle was recognized in the case of *Smith v. Spinolla*, (2 *Johns*. 198.) Agreeably to this principle, the Supreme Court of the state of *Massachusetts*, in the case of *Pearsall v. Dwight*, (2 *Tyng's Mass. Term Rep.* 84.) decided that the statute of limitations of this state could not be pleaded in bar to an action on a promissory note, made in this state, brought in the state of *Massachusetts*, against the maker, who was an inhabitant of that state.

J. Tallmadge, contra. As both parties resided out of the state at the time the contract was made, no return into this state could have been contemplated. (2 *Dallas*, 217.) The case does not come within the words of the proviso in our statute. If the doctrine contended for on the other side be correct, many inconveniences will arise; many antiquated demands will be revived and enforced. A debt which has become barred by the lapse of time limited by the statute of this state,

ALBANY,
August, 1808

RUGGLES
V.
KEELER

might be recovered in *Connecticut*, where the statute of limitations is much longer, if the debtor should happen afterwards to go to that state, and be there arrested; so that the operation of the statute of this state would, in many cases, be defeated. Again, the statute of limitations having begun to run in *Connecticut*, it will continue to run, notwithstanding the removal of the plaintiff into this state, and by the law of *Connecticut* the debt would have been barred; the statute of *Connecticut*, therefore, may be pleaded in bar of the action here. (*Smith v. Hill*, 1 *Wilson*, 134.)

[* 266]

Ruggles, in reply. The arguments on the other side were urged in every possible shape, and at great length, *in the case of *Nash v. Tupper*. The only question is, whether, in a suit here, we are to be governed by the statute of *Connecticut*, or by our own law. If the court is to be governed by the statute of this state, then the plaintiff in error is clearly within the proviso, for the statute could not begin to run until he came within the jurisdiction of this state. The exception is general, and extends as well to foreigners or persons residing out of the state, as to natives who have gone abroad. (*Strithorst v. Greame*, 2 *Black*. 723.)

KENT, Ch. J., delivered the opinion of the court. This case presents an important question arising under the rules of prescription which prevail in the different states. An inhabitant of *Connecticut* sues here upon a promissory note, and a demand arising between the parties, while they were respectively inhabitants of *Connecticut*, is now offered by way of set-off. This demand is objected to, as barred by the statute of limitations of *Connecticut*, as well as of this state.

The first question which naturally arises is, whether the act of limitations of this state can be interposed in bar to the matters contained in the set-off.

The act requires, that all actions founded upon any contract, without specialty, shall be brought within six years next after the cause of action accrued. These words would, undoubtedly, unless controlled by the exception in the statute, apply even to the case of foreigners, and to causes of action arising abroad. The statute of 21 *Jac.* I. was so understood by Lord Ch. *Cowper*, in the case of *Duplein v. De Roven*, (2 *Vern.* 540.) which arose shortly before the statute of *Anne*, and he observed, that "it was plausible and reasonable, that the statute of limitations should not take place, nor the six years be running, until the parties came within the cognizance of the laws of *England*; but that must be left to the legislature." But a proviso in the statute of *Anne*, and which we have adopted in our act of limitations, saves the operation of the statute, if the party shall be "out of the state," at the time the cause of action arises against him, *and the statute does not

[* 267]

206.

begin to run until "after the return" of the defendant. Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the *English* statutes, which also speak of *the return* from beyond seas of the party so absent. The word *return* has never been construed to confine the proviso to *Englishmen*, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad. This was evidently the opinion of Lord *Talbot*, in the case of *Duplein v. De Roven*. In *Strithorst v. Greame*, (3 *Wils.* 145. 2 *Black. Rep.* 723. S. C.) the point was so ruled by the Court of C. B. in *England*.

The party to be charged by the set-off not having been six years within this state, since the cause of action arose, our statute of limitations could not, therefore, be replied to the plea.

The next question is, upon the *Connecticut* statute of limitations.

In *Nash v. Tupper*, this court determined that we were bound to confine ourselves to our own statute of limitations, and could not regard that of any other state. The question arose there upon a replication to the usual plea of *non assumpsit infra sex annos*. The replication stated, that the cause of action arose in *Connecticut*, and that the demand was not barred by the act of limitations of that state, and upon demurrer, this replication was held ill: And whether we consider the question upon principle or authority, I am satisfied that the decision in that case was correct. The general doctrine which we there recognized, goes far towards settling the present question. A foreign statute of limitations can no more be pleaded to a suit instituted here, than it can be replied to a plea under our statute. Statutes of limitations are municipal regulations, founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. Suppose *Ruggles* had sued *Lewis* upon the account attempted to be set off in the court below, the defendant could not have interposed the statute of limitations of *Connecticut* by way of plea; and the rule is the same whether the foreign statute be interposed against the demand of the plaintiff or the set-off of the defendant. It was stated upon the argument, as a plausible objection to the rule, that stale demands might, in this way, be revived and enforced against persons who happen to be found in this state, and have not resided here long enough to be protected by the statute of limitations of this state.

ALBANY.
August, 1809.

RUGGLES
v.
KEELER

[* 268]

ALBANY,
August, 1808
JACKSON
v.
DIEFFENDORF
and ZOLLER.

The answer is, that a presumption of payment will undoubtedly attach to stale demands. When this presumption is to be let in, will depend upon the age and nature of the demand, and the special circumstances under which it may present itself. We do not at present undertake to lay down any precise rule on the subject. It is sufficient to observe, that this presumption of payment must, as a matter of evidence, be left in each case to be raised or repelled by the respective parties, and, in this way, any serious inconvenience from the revival of dormant claims will be avoided.

In the present case, the court below rejected the evidence of the set-off, and their decision was, therefore, erroneous, and must be reversed.

THOMPSON, J., and YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment reversed.

[* 259] *JACKSON, *ex dem.* WRIGHT and others, *against* DIEFFENDORF and ZOLLER.

Where W. having been turned out of the possession of a lot of land, under a judgment by default against him, in an action of ejectment by D. afterwards brought his action of ejectment to recover the possession, and showed that he, and those under whom he claimed, had been in the actual and quiet possession of the premises in question, from 1765 to 1803, when he was so ejected by D., it was held, that

such a possession was sufficient and conclusive evidence of title, notwithstanding that by a recent survey of the tract, and according to a partition deed of 1744, the premises in question were really included in the bounds of an adjoining lot, released to D. by the deed of partition under which those under whom W. claimed, originally took possession, and although W. had suffered a judgment by default against him. Where a location is made under a deed and survey, and an undisturbed possession held according to such location for 38 years, it shall prevail, though, by a subsequent survey, it should appear, that such location was not accurately made.(a)

THIS was an action of *ejectment*, for 25 acres of land. The case stated that the patent of *Hartman Windecker* and others, was dated the 12th of *November*, 1731, and that, in 1743, it was divided into eleven lots, and numbered from one to eleven, inclusive; that partition deeds were executed in 1744 by the proprietors, by which lot No. 2 was released to *Windecker*; that he, on the 28th of *March*, 1754, conveyed 25 acres of the south end of lot No. 2 to his daughter *Gertrude*, who married *Jacobus Pickard*, the 28th of *October*, 1765; that *Pickard* and his wife conveyed the 25 acres to *Frederic Blank*, who devised the same to *House* and *Wright*, two of the lessors of the plaintiff; that in 1765, *Blank* took possession of the premises under the deed, and such possession continued in him, and in others claiming under him, until *May*, 1803, when *Wright*, the tenant, was turned out of possession, by a writ of possession, under a judgment by default, in an action of ejectment, in favor of the present defendants, against *Wright*.

(a) See *Jackson v. Rightmire*, 16 Johns. 314

It was admitted that the defendants are owners and possessors of lot No. 3, in the said patent, which, according to the testimony of *Cornelius C. Beekman*, a surveyor, and the partition deeds, included the premises.

The question on the case was, whether the plaintiff was entitled to recover.

ALBANY.
August, 1808.

JACKSON

v.
DIEFFENDORF
and ZOLLER

Van Vechten, for the plaintiff.

Cady, for the defendant.

*VAN NESS, J., delivered the opinion of the court. Shall a possession of 38 years be disturbed, because, from a recent survey, it appears not to correspond with the partition deeds executed 60 years before? Shall not the parties to that partition, and all those who claim under them, be concluded by so long an acquiescence? It is unquestionably the true rule, and every legal presumption, every consideration of policy requires, that this evidence of right should be taken to be conclusive. A location made in 1765, and probably, in exact conformity to the survey made on the partition in 1744, and quietly suffered to be continued by the proprietors of the adjoining lot, until 1803, is, and ought to be, final and conclusive. These circumstances furnish the best and most satisfactory evidence of the true line of division between the two lots. This general doctrine will not be denied, and the only question is, as to the application of it to the present case. What is to be the effect upon this title, on the recovery in ejectment by default, and an entry pursuant thereto, in 1803? This is the real point in dispute between the parties.

[* 270]

The recovery, in 1803, against the lessors of the plaintiff, does not conclude them from setting up this evidence of title. The amount of a recovery in ejectment is accurately and forcibly stated, by Lord *Mansfield*, in the case of *Atkyns v. Horde*. (1 Burr. 114.) It is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear, even between the same parties. He who enters under it, in truth and substance, can only be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no title, he is in as a trespasser. *If he had no right to the possession, then he takes only a naked possession.* This is the obvious and established construction of the nature and effect of a judgment in the action of ejectment. It follows, therefore, that *Wright*, one of the present lessors of the plaintiff, lost the possession *only, without prejudice to the right. The right under the location, after the possession and acquiescence therein, remains in the lessors of the plaintiff, and is not impaired by the recovery in 1803.

[* 271]

The plaintiff must, therefore, have judgment.

VOL. III.

ALBANY,
August, 1808.

WARD
v.
CENTER

YATES, J., and THOMPSON, J., not having heard the argument in the cause, declined giving any opinion.

Judgment for the plaintiff

WARD *against* CENTER.

Whether an action as for a *deceit*, on a parol affirmation or representation, which is false, as to the credit and responsibility of a third person, whereby the plaintiff was induced to trust such person, in consequence of which he suffered a loss, is maintainable; and whether fraud, or an intention on the part of the defendant to deceive the plaintiff, or some collusion between the defendant and the person

[* 272]
recommended, must not be proved? *Que-re.* Whether there is fraud or not, is a question of fact for the jury to decide, and where there is evidence on both sides, and the jury are not misdirected as to the law, the court will not set aside their verdict. (a)

THIS was an action on the case, for a *deceit*. The declaration stated that the defendant, intending to deceive and defraud the plaintiff, falsely and fraudulently affirmed that one *Ebenezer Brown* was worth 5,000 dollars, and that, as far as the said defendant had dealings with him, the said *Brown* had been punctual in his payments, and that he was a responsible man, and thereby falsely, fraudulently and deceitfully procured the plaintiff to sell to the said *Brown* upon trust and credit, goods to the value of 618 dollars and 84 cents; and also, that the defendant, on the 23d of *October*, 1806, intending to deceive and defraud the plaintiff, did wrongfully and deceitfully encourage and persuade the plaintiff to sell and deliver to the said *Brown*, other goods, wares and merchandises, to wit, of the value of 618 dollars and 84 cents, upon trust and credit, and did, then and there, for that purpose, falsely, deceitfully and fraudulently, assert and affirm to the plaintiff, that the said *Brown* was a person safely to be trusted and given credit to, and did thereby falsely, fraudulently and deceitfully, cause and procure the plaintiff to sell and deliver the said goods and merchandises, *of the value aforesaid, to the said *Brown*, &c
Plea, the general issue.

The cause was tried at the *Albany* circuit, in 1807, before Mr. Chief Justice *Kent*.

At the trial, one *Humphreys*, a clerk of the plaintiff, testified, that on the 23d of *October*, 1806, *Brown* called at the store of the plaintiff, and requested a credit for goods. Upon the clerk's making inquiry into his circumstances, *Brown* referred him to the defendant for information, he being the only one that knew him. The witness applied to the defendant, who told him that *Brown* was a responsible man, as he had been informed by people who resided at the place from whence *Brown* came; that the defendant had sold his stock in trade to *Brown*, and that he had found, to his satisfaction, that *Brown* was worth 5,000 dollars. The witness then asked the defendant whether *Brown* had been punctual in his payments to him, to which the defendant answered that he had been, as far as he

(a) See *Sargent v. —*, 5 *Cow. Rep.* 106. *Van Vechten v. Graves*, 4 *Johns.* 406—
Meyer v. M'Lean, 1 *Johns.* 509.

ward } 3 Johns
v }
Center } 271

ANY,
1803.
RD
TER.

[* 273]

he went away.

The deposition of *G. Kibbe* was next read, who said, that some time in *June*, 1806, in answer to the inquiries made of him by the defendant, relative to the circumstances of *Brown*, he told the defendant that he believed *Brown* to be a man of

ALBANY,
August, 1808.

WARD
V.
CENTER.
[* 274]

honesty and integrity ; that he owed some debts in *Vermont* and *New-Hampshire*, but that he believed the debts due to *Brown* there, and which were good, were more than sufficient to pay all the debts *Brown* owed there ; and that *Brown* had lands in **New-Hampshire* to the amount of 3 or 4,000 dollars ; that he understood from the defendant that *Brown* was a considerable debtor to him, and that the inquiries were made by him to ascertain the responsibility of *Brown* ; that he told the defendant that *Brown* would be able to pay him, and, though he might not be punctual in his payments, he had no doubt but he would pay the defendant ; that the witness observed further, that he knew one *Hawkins* was a debtor of *Brown* for about 600 dollars, and which he believed would be paid ; that he further told the defendant that *Brown* was a respectable citizen, and considered as one of the most upright men, and that the witness had known him for five or six years, having lived within three miles of his house ; that *Brown* had been a justice of the peace, that he had transacted considerable business with him, that before and after he came to reside near the witness, he had been considered a man of good character and of property ; and that he considered him a man fit to be trusted, and on whom dependence might be placed.

The defendant then called a Mr. *Davis*, who had become a partner in trade with the defendant in the spring of 1806, who testified, that they credited *Brown* in *July* and *August*, 1806, about 124 dollars ; that in the autumn of the year, they designed to deposit money in the hands of *Brown*, to purchase flax seed, and had perfect confidence in him to the time he went away, arising as well from a personal acquaintance as from the information derived from *Kibbe* ; that during the summer of 1806, the witness and the defendant had a running account with *Brown*, which was paid.

The defendant then called the clerk of *Brown* as a witness, who testified, that he went to live with *Brown* in *July*, 1806 ; that after that time, there was a considerable quantity of goods in the store ; that in *August* of that year, there were goods to a greater amount than 1,100 dollars ; that *Brown* absconded on *Tuesday*, the 4th *November*, and took no goods with him, and that the witness kept the store open until *Saturday* of that week, expecting his return, *having no suspicions of his situation ; that the defendant was frequently in *Brown's* store, and lived in the same house where the store was kept.

[* 275]

The attorney who entered up the judgment on the warrant of attorney in favor of the defendant, against *Brown*, stated, that he had always considered *Brown* as a man of strict veracity and integrity ; and that he explained to him the effect of the bond and warrant of attorney, which he had given to the defendant.

Several witnesses bore testimony to the good character of *Brown*, and one of them stated that he sold him goods or

credit in *June*, 1806, to the amount of 300 dollars, and that he had confidence in him, and would have trusted him to the day on which he went away. It appeared that the defendant, in his conversation with the clerk of the plaintiff, when he recommended *Brown*, did not mention the bond and warrant of attorney which he held.

The chief justice charged the jury, that the only inquiry for them was, whether the defendant had fraudulently recommended *Brown*; that it was a question of fact, whether there was fraud or not, on which he should give no opinion, but leave it with them to decide.

The jury found a verdict for the plaintiff for 646 dollars and 15 cents.

A motion was made by the defendant to set aside the verdict, as being against evidence.

Though the court did not examine or decide the question of law, which was raised by the counsel, yet as they were permitted to discuss it, and as it is a question of importance, it has been thought proper briefly to state their arguments.

E. Williams and *Sedgwick*, for the defendant. The charge of fraud is easily made, readily received, and too often supported by slender proof. It ought, however, always to be made out by the strongest and most unequivocal evidence, especially where it is alleged to consist in *parol* declarations, so liable to be misunderstood and misrepresented. The declaration in this case is, evidently, taken *from the one in *Pasley v. Freeman*. (3 Term, 51.) That action, as Mr. Justice *Grose* observed, was "as novel in principle as it was in precedent." That case, however, came before the court, on a motion in arrest of judgment, by which every fact stated upon the record was admitted to be true; and the declaration expressly averred, that the defendant intended to deceive, and did falsely, fraudulently, and deceitfully assert, &c., and that he well knew, &c. Mr. Justice *Buller*, though he thought the plaintiff entitled to recover, agreed, that "no action could be supported for telling a bare naked lie," which he defines to be, "the saying a thing which is false, knowing or not knowing it to be so, without any *design* to injure, cheat, or deceive another person." He puts the case altogether on the *intention*, or corrupt motive of the defendant. He does not cite a case, nor put an example in which there was not either a *collusion* on the part of the defendant, or an *intention* to deceive and defraud; and those are cases of assertions by one of the parties to the contract against whom the action was brought. The *quo animo*, or intention, Mr. Justice *Ashhurst* states to be the *gist* of the action. *Fraud* or *deceit* is admitted, on all hands, to be the essence and foundation of this action.

In *Haycraft v. Creasy*, (2 East, 92.) there were, after repeated inquiries and cautions, reiterated assertions, in which the defendant positively affirmed, from his own knowledge, that he

ALBANY,
August, 1803.
WARD
v.
CENTER

[* 276]

ALBANY,
August, 1868.

WARD
CENTER.

[* 277]

knew Miss *Robertson* to be a person of large property, and that the plaintiff might *credit her with perfect safety*. Yet all the judges, except Lord *Kenyon*, were of opinion, that the action could not be maintained, without proving that the defendant intended to deceive and defraud the plaintiff; and they expressly declare, that *fraud* or *deceit* is the foundation of the action. In *Tapp v. Lee*, (3 *Bos. & Pul.* 367.) the Court of *C. B.* held that there must be *fraud*, and an *intention* to deceive, satisfactorily proved, in order to support this action. They very reluctantly acceded to the doctrine of *Pasley v. Freeman*, that such an action would lie at all; and Lord *Alvanley* expressed his wish that the *legislature would interfere, and restrain actions of this kind, unless the representations were made in writing; but after the determinations which had been made in the *K. B.*, he considered himself bound to hold, that such an action would lie *ex delicto*. This court is not under the same embarrassment. Unshackled with any binding authority, there is no necessity to express any wish for a legislative interference.

In the case of *Evans v. Bicknell*, (6 *Ves. jun.* 185, 186.) in which Lord *Eldon* has occasion to remark on the case of *Pasley v. Freeman*, he observes, that he considered the doctrine laid down in that case, as most dangerous in practice; that when he was chief justice, he so far doubted the principle of it, that he always offered and recommended, that a special verdict should be taken, but for some reason or other, the offer was uniformly rejected; and that "he could do no more than to point out to juries the danger of finding verdicts upon such principles." His lordship thought it "most extraordinary, that if the plaintiff, in the case of *Pasley v. Freeman*, had come into a court of equity, insisting that the defendant should make good the consequences of his representation, and the defendant should positively deny that he made such representation, and only one witness should be produced to prove it, that equity should refuse any relief; and yet that under the very same circumstances, the plaintiff, in a court of law, should be enabled to recover." Such a case would prove the absolute necessity of affording protection to the defendant, by a statute requiring all such undertakings to be in writing. This action, as has been observed in the case cited, certainly affords a very easy method of evading the statute of frauds; for if *A.* says to *B.* "Trust *C.* and I will pay you," no action would lie against *A.* for the goods obtained by *C.*; yet if *A.* had merely said, "*C.* is a good and responsible man," or "I am informed that he is a good and responsible man," he is held liable for all the *credit* which *C.* obtains from *B.* by that assertion, to an indefinite extent and amount. Ought a person to be thus made liable, perhaps, to more than the amount *of his whole fortune, for having answered to a question concerning the character of another, what, from the best information he possessed, he might fairly believe

[* 278]

ALBANY.
August, 1808.WARD
V.
CENTER

to be true? We are aware, that on a motion of this kind, it is not regular to discuss the question of law, and it would have been better, had the question come before the court on a motion in arrest of judgment, or in some other shape; yet this affords an additional reason to induce the court to lay hold of slighter circumstances in the case, and to grant a new trial. In *Tapp v. Lee*, Lord *Alvanley*, though he could not say that it was a verdict against evidence, but as there were circumstances of suspicion, he thought the verdict ought to be set aside, on the payment of costs. In the present case, there is no ground to complain of the *misdirection* of the *chief justice*; but we have to regret that he did not, as appears to have been the practice of Lord *Eldon*, caution the jury against finding a verdict for the plaintiff.

But if we examine the evidence in this case, we shall find some ground to regard this as a verdict against evidence. Only one witness was produced on the part of the plaintiff, and he was the clerk of the plaintiff, and sold the goods on credit, in the absence of his master. The defendant is proved to be a person of a fair and honorable character, and this ought to have some weight against the testimony of a witness who may be biassed. The defendant said what he, no doubt, believed to be true; and he explicitly stated the grounds of his belief, as derived from the information of persons in *Vermont*, where *Brown* had formerly lived; thereby giving the plaintiff an opportunity to satisfy himself of the truth from the same source. All the witnesses coincide in declaring *Brown*, until the time of his departure, to have been a person of good character, and one whom they would have trusted. Not a single person in *Albany* expressed any doubt or distrust of him. except the clerk of the plaintiff, who made the inquiry, as *Brown* was a stranger to him. No attempt was made to prove, nor was it pretended, there was any **collusion* between the defendant and *Brown*. Some stress has been, and may be again laid on the circumstance, that the defendant did not mention to the clerk of the plaintiff, at the time he made the inquiry concerning *Brown*, that he had a bond and warrant of attorney against him. But the warrant of attorney was taken when *Brown* was a stranger to the defendant, and was not enforced until after *Brown* absconded. It was no lien or encumbrance, and the defendant was not bound to disclose it. The refusal of the defendant to give his note to the plaintiff for the goods, cannot be urged against him; for had he accepted the proposal, it would have been an implied acknowledgment of fraud or collusion. By granting a new trial, in this case, on payment of costs, the court will not go further, in the exercise of their power over verdicts, than the Court of Common Pleas did, in a similar case, (*Tapp v. Lee*) in *England*, where doubts were entertained that justice had not been done.

[* 279]

ALBANY,
August, 1808.

WARD
V.
CENTER

[* 280]

Henry and Ostrander, contra. The ground of this action is a violation of that moral obligation, which is incumbent on every man, to speak the truth, and not deceive his neighbor, to his injury; for it is agreed that fraud or deceit is the basis of the action, and the essence of fraud is deceit. The opinion of Mr. Justice *Buller*, and of the majority of the court in the case of *Pasley v. Freeman*, if attentively examined, will be found to rest on solid principles of law, as well as of morality and justice, which are the basis of all law. Every case put by Mr. Justice *Grose*, on whose opinion so much stress has been laid, was fully answered by Mr. Justice *Buller*. Where a person will falsely assert a fact, with intent to deceive, whereby another is injured, an action will lie; though not where the representation is a mere matter of judgment or opinion. Lord *Kenyon*, in the case of *Haycraft v. Creasy*, considered the doctrine laid down in *Pasley v. Freeman*, as acquiesced in and established; he considers it as well settled, on principles of morality and justice. *The observations of Lord *Eldon*, on that case, are made in reference to the proceedings in a court of equity, where the oath of the defendant would countervail that of a single witness; his objection is not so much to the principle of the action, as to the evidence by which it is supported in a court of law. But this rule of a court of equity, adopted from the civil law, has been questioned; for the oath of a disinterested witness ought, on principles of reason, to outweigh the oath of an interested party. Lord *Eldon* recognizes the case of *Pasley v. Freeman*, and admits that it could have been maintained in a court of equity.

Again, as to the objection of the statute of frauds. A promise to pay for another is not binding, since the statute; not because it ought not to bind, on principles of common law, and in justice, but because of the positive rule founded on principles of policy, and to guard against fraud, which requires it to be in writing.

Lord *Kenyon*, in *Eyre v. Durnford*, (1 *East*, 318.) and in *Haycraft v. Creasy*, observed, that the statute of frauds had nothing to do with the case. The statute raises a legal presumption of fraud, for the want of certain formalities in contracts, but it does not apply where there is an action for an actual fraud or deceit. In *Tapp v. Lee*, *Chambre, J.*, said that he did not think the statute of frauds extended to cases of this sort; and "though the action was modern in practice, he should still think, even if there had been no decision on the subject, that it was founded on solid and legal principles."

This cause was left to the jury on a question of fact, as to the fraud and intention to deceive. Where there is a contrariety of evidence, it is the peculiar province of the jury to weigh the testimony, and draw the inference of fact. In such a case, the court never invades the province of the jury, by interfering to grant a new trial. The circumstance of the
216

defendant's concealing the bond and warrant of attorney against *Brown*, was very properly urged to the jury, as a strong circumstance of fraudulent *intent. He might well suppose, that had he disclosed that fact to the plaintiff, he never would have trusted *Brown*; since, if he were to sell him goods on credit, they would be liable, the next day, to be taken in execution, to satisfy the debt of another. Can it be said, that this was a verdict against evidence? If not, on what ground is the present motion to prevail?

ALBANY,
August, 1803.

WARD
v.
CENTER.

[* 281]

VAN NESS, J. This is an application for a new trial, on a case made, and the only question now to be determined is, whether the court can deem the verdict so much against the weight of evidence as to justify the setting it aside. Whether this action can be at all sustained, is not the point now before us; whenever that question arises, I shall be prepared to decide upon it.

The case of *Pasley v. Freeman*, (3 T. R. 51.) seems to have been taken for law, but it never has, to my knowledge, received the sanction of this court. That the principles upon which that decision was made, have been carried far enough, has been admitted, and that this is an action not to be encouraged, so long as the provisions of the statute of frauds are considered salutary, I am fully persuaded. The basis of the action is fraud. Fraud is a crime. It is never to be presumed, but must be most conclusively proved. I think that I should never have given such a verdict as the jury have found in this cause. There is every reason to believe that the defendant had a full and perfect confidence as well in the integrity, as solvency of *Brown*. This is evident, from every part of his conduct. The defendant's partner, who had the same opportunity of knowing and judging of *Brown's* circumstances as the defendant had, did not at any time entertain the least suspicion of his being insolvent, and a number of *Brown's* neighbors concur in saying that their confidence in him was unshaken, until he absconded. To render the defendant responsible under such circumstances, on the ground of a fraudulent misrepresentation of *Brown's* credit and situation, appears to me, to say the least of it, to be *summum jus*. But, notwithstanding *this, I am not prepared to say, that there is no evidence upon which the jury might find the fraud. They were not misdirected (as was the case in *Pasley v. Freeman*) on a point of law. It certainly is a circumstance of some weight, that the defendant concealed the fact of his having in his possession the bond and warrant of attorney to confess judgment. Had he communicated this fact, I should have no hesitation in granting a new trial. Fraud is imputable, in some cases, as well where a man suppresses the truth, as where he represents what is false. Perhaps, if the existence of the bond and warrant of attorney had been disclosed, the plaintiff would not

[* 282]

ALBANY,
August, 1808.

WARD
v.
CENTER.

have given *Brown* credit for the goods. This part of the evidence, doubtless, had great influence with the jury; and yet, I think it perfectly reconcilable with good faith and integrity, on the part of the defendant. Upon the whole, though with reluctance, I am of opinion, that it is not expedient to interfere with the verdict. The question of fraud has been fairly submitted to the jury, and they have found against the defendant. They had a right to do so; though I may wish that they had done otherwise.

SPENCER, J. This case has been argued by the defendant's counsel, as though this was a motion in arrest of judgment, and the several cases decided in the *English* courts have been cited and commented upon in that view; but we are only called on to decide whether the jury had sufficient evidence before them to justify their verdict on the issue joined between the parties.

Humphrey certainly proved the plaintiff's case; and it was a question in some measure of credit between him and *Case*; *Humphrey* swearing that *Case* was not present, and *Case* testifying that he was, when the defendant made his representations to *Brown*. To which of these witnesses credit was due, it is not for the court to say; the jury have seen fit to give credit to the testimony of *Humphrey*, and I see no reason to think differently. Had the fact been less doubtful on the point of falsely representing *Brown*, the witnesses to the defendant's general good, and, *indeed, exemplary character, would have turned the scale. As it is, I cannot say, that I am dissatisfied with the verdict.

I am, therefore, of opinion, that the defendant take nothing by his motion.

KENT, Ch. J., concurred.

THOMPSON, J., and YATES, J., not having heard the argument in the cause, gave no opinion.

Rule refused

[* 283]

JACKSON, *ex dem.* WALDRON, and ELTIE, his Wife,
against WELDEN.

ALBANY,
August, 1806.

JACKSON
v.
WELDEN

THIS was an action of *ejectment*, for lands claimed by the lessors of the plaintiff, as lying within the *Half Moon*, or *Van Schaick's* patent, in *Saratoga* county. The cause was tried at the *Saratoga* circuit, the 4th *June*, 1807, before Mr. Justice *Spencer*.

On the trial, the plaintiff proved that the defendant paid rent for the premises to *Tobias C. Ten Eyck*, previous to the year 1791; that in the year 1791, *Ten Eyck* died, and by his will, bearing date the 25th *November*, 1791, he devised all his real estate in the said patent, to *Eltie*, one of the lessors of the plaintiff. The defendant claimed the premises under the patent of *Kayaderosseras*.

The defendant then offered to give in evidence,

*1. That the rent paid was previous to 1793, and that *Ten Eyck* claimed the premises as lying within *Van Schaick's* patent, and that the premises were at the same time claimed by other persons, under the *Kayaderosseras* patent.

2. An act to ascertain the bounds between these two patents, passed the 11th *March*, 1793.

3. The determination of the commissioners under that act, on the 5th *February*, 1794, that the premises were included in the *Kayaderosseras* patent.

4. That, upon that determination, the lessors of the plaintiff abandoned their right to the premises; and that the defendant derived a title under the patent of *Kayaderosseras*.

The judge rejected all the evidence as inadmissible, except under the last point.

The defendant then proved, that in *June*, 1806, in a conversation with one of the lessors of the plaintiff concerning this suit, he admitted, that upon the determination of the commissioners, he had given up his claim; but that having recently been informed that *Tobias C. Ten Eyck* did not sign the petition to the legislature, for the appointment of the commissioners, he had renewed his claim.

The defendant further offered to prove, that previous to the determination of the commissioners, other persons resided on lands claimed by *Ten Eyck*, in his life-time, as lying within *Van Schaick's* patent, and paid rent to him, and, afterwards,

A. being informed, that as he did not sign the petition to the legislature, he was not bound by the award of the commissioners, brought an action of *ejectment* against B., and attempted to recover on the possession of B. as his tenant, as continued from 1791: It was held that A. having so long acquiesced in the award of the commissioners, and having permitted B. to purchase of, or *attorn* to a stranger, he could not now recover on the ground of the prior tenancy of B., but must produce his title. (a)

Whether the award of the commissioners was conclusive as to the title of A. ? *Quere*.

A., as the owner of land situate in the patent of *Van Schaick*, permitted B., in 1791, to occupy it, and for which B. paid him rent. Disputes having arisen between the proprietors under *Van Schaick's* patent, and those of the *Kayaderosseras* patent, an act of the

[* 284]

legislature was passed in 1793, (on the petition of various persons claiming under the several patents,) appointing commissioners to settle the bounds of the respective patents, and by the award of the commissioners, in 1794, the land of A. was determined to be within the patent of *Kayaderosseras*. On this, A. said, that he gave up all claim to the land, and B., with the knowledge of A., purchased the land of the proprietors under the *Kayaderosseras* patent. About ten years afterwards, during which time no rent was demanded of B.,

(a) See *Jackson v. Vincent*, 4 *Wend. Rep.* 633. *Jackson v. Davis*, 5 *Cow. Rep.* 124

ALBANY,
August, 1808.

JACKSON
v.
WELDEN.

to one of the lessors of the plaintiff, as claiming under him, since his death; that *Waldron* claimed the rent up to the time of the determination of the commissioners, and then with full knowledge that his tenant had agreed to purchase the land under the patent of *Kayaderosseras*, he abandoned his right and told the tenant that a title under the patent of *Kayaderosseras* was valid; but this evidence was overruled.

[* 285]

The judge charged the jury, that the plaintiff had, in the first instance, made out a title; that the evidence offered by the defendant, was not sufficient to establish the fact, that the lessors of the plaintiff had abandoned their right, but that if the jury thought otherwise, they might find for the defendant.

The jury found a verdict for the plaintiff.

A motion was made for a new trial, on the following grounds:—

1. Because the evidence excluded ought to have been admitted.
2. Because the judge misdirected the jury.
3. Because the verdict was against evidence.

Russel, for the defendant. By the act of the legislature of the 11th March, 1793, and the award of the commissioners appointed pursuant to that act, a complete title was vested in all the persons claiming under the patent of *Kayaderosseras*. (*Greenleaf's* edition of the laws, v. 3. p. 81. 16 sess. c. 57.) The first section of the act declares, that the determination of the commissioners, or any three of them, shall be final and conclusive, as to all the rights, titles and interests derived under the respective patents of *Kayaderosseras*, *Half Moon*, and *Shamondhoi*, or *Clifton Park*, and shall absolutely vest the right, title and interest in the lands determined to be within the respective bounds of each patent, settled by the commissioners, with the same estate as would have vested, had they been undoubtedly included in the original patents respectively; and all persons were excluded from any other title than what they might hold under the award of the commissioners. (a)

The exemplification of this award, which was offered in evidence, ought, therefore, to have been received.

[* 286]

*Again, the defendant in *ejectment* may show that the title of the lessor of the plaintiff is at an end, or has expired, and that he has no right to turn him out of possession. (*England v. Slade*, 4 Term Rep. 682.) The rule that a tenant cannot dispute the title of his landlord, is not denied; but if the title

(a) Three of the commissioners, *Egbert Benson*, *Samuel Jones* and *Peter Cantine* by their award, made the 25th February, 1794, pursuant to the act, determined the several boundary lines, laid down, mentioned and included in the map and field book of the survey and partition of the *Kayaderosseras* patent by *Christopher Yates*, *John Glen* and *Thomas Palmer*, as commissioners, and *Charles Webb* as surveyor, and filed in the office of the clerk of the city and county of *Albany*, as and for the boundary line or lines of the said patents, to be the boundary lines between the said patents respectively.

of the landlord is at an end and gone, it is competent to him to prove that fact. The act of the legislature and the award of the commissioners, put an end to the title of the lessor of the plaintiff, and no rent has since been claimed. All the rights and obligations existing between the landlord and tenant were destroyed with the estate or title. The evidence was also admissible, as affording a strong presumption that the lessor of the plaintiff had abandoned his title. If a landlord will stand by and suffer his tenant to do acts inconsistent with his tenancy, he shall be bound by them. (1 *Esp. Cases*, N. P. 366.) The witness, *Rosekrans*, did, in fact, prove that the lessor had completely abandoned his title, and relinquished all claim, after the award of the commissioners. The judge, therefore, misdirected the jury by saying, that the evidence of an abandonment was not sufficient.

ALBANY.
August, 1808
JACKSON
V.
WELDEN

Van Vechten, contra. The defendant ought to have shown that the lessor of the plaintiff was a *party* to the award of the commissioners, or that he had joined in the petition to the legislature on which the act was passed. An act concerning private rights, cannot affect the rights of persons who do not join in the petition, or assent to it. As against them, the act must be considered as inoperative and void. It would be against the constitution, and every principle of justice and liberty, if the rights of a person could be taken from him without his privity or consent. Until, therefore, it was shown that the *lessor of the plaintiff* had subscribed or assented to the petition to the legislature, which produced the act in question, it was improper to allow the award under the act, to be given in evidence against him.

Again, the act of the 7th *April*, (*Greenleaf's* ed. of the laws, v. 3. p. 222. 18 sess. c. 57.) 1795, explains the intention of the legislature in the former act of 1793, and as it is a public act, the court will take notice of it. After *reciting the previous proceedings, the prior act, and the award of the commissioners, it declares, "that the title of no person whomsoever, claiming lands in either of the said patents, by lease, or by purchase in fee simple, and who did not unite in an application to the legislature for the act of the 11th *March*, 1793, and who did not subscribe to the agreements and petitions therein mentioned, shall be bound, or any way affected by the determination of the commissioners," &c. The last act thus confirms what I contend to be the true construction of the first act, that those who had not joined in the application or submission to the legislature, were not concluded as to their rights, by the award of the commissioners. If the act, then, does not bind the plaintiff, nor take away his rights, it cannot alter or dissolve the relation of landlord and tenant, which existed at the time. The rights and relations of the lessor

[* 287

ALBANY,
August, 1808.

JACKSON
v.
WELDEN.

of the plaintiff and his tenants, remain in the same situation as if that act had never been passed.

Again, it is urged, that there was evidence that the lessor of the plaintiff had abandoned his claim. But if he expressed himself and acted under a mistake, as to the operation of the act of the legislature, when he was not in fact affected by it, he must be allowed to assert his rights, as soon as he has discovered this mistake, and ought not to be prejudiced by an involuntary error. The defendant, also, may have acted under a mistake when he made the purchase, and if so, he is not to be censured; but the mistakes and misapprehension of the parties, as to the state of their rights, after the passing of the act, can never be construed into an abandonment of them.

[* 288]

Emott, in reply. Prior to the year 1791, the defendant had paid rent to the ancestor of the lessor of the plaintiff. After the act of 1793, no rent was demanded, nor any title asserted, until the commencement of the present action. The lessor of the plaintiff stood by, and saw the defendant occupy the premises, and finally purchase *from a stranger, in whom he supposed the legal title to be vested.

The first ground of objection is, that the lessor of the plaintiff's title was extinguished by the act of 1793, which is final and conclusive. That act was not unconstitutional. These statutory arbitrations were frequent before the revolution, and have been used since. The practice is too well settled to have its utility called in question. No mode could possibly be devised so salutary and efficacious, in settling those conflicting claims to lands, which would otherwise produce endless litigation, and incalculable expense to the parties. Nothing could better promote the ends of justice and the peace of the community. If the act is unconstitutional, it must either be because it deprives the party of the benefit of a trial by jury; or because no new court can be instituted which does not proceed according to the course of the common law; (41st art. of the constitution of *New-York*;) or that it deprives the party of the right of appeal to the court of the *last resort*. But neither of these objections is applicable to the present case. The uniform practice of the legislature, in passing acts to settle controversies of this nature, affords the best construction of the constitution. In saying that no new court should be instituted but such as shall proceed according to the common law, the framers of the constitution meant to declare no more than that no court should be instituted that was not governed by the common law, which the people claimed as their birth right.

If the claims of these contracting parties rested on questions of law, they could not be determined by a jury. Again, it will not be denied that the act in question might be passed at
222

the instance of the parties: And we are to presume that all proper parties were before the legislature.

If the act of 1793 gave any rights, they were vested rights, and the legislature could not, by the act of 1795, divest them. If the law of 1793 was binding only on parties and privies, and not on strangers, the legislature *could not pass an act to declare who were parties or privies, for that is a question of common law and of judicial cognizance. If strangers were bound by the first act, then there is an end to the question. The second act was as much a private one as the first, and it ought to have been produced. When a private act is produced, those who are injured by it may come in and show that it was obtained by false suggestions, and the party producing the act shall not avail himself of it. Private acts are like grants from the crown in *England*, and may be avoided in the same manner. If the act of 1795 had been produced, the defendant might have shown that *Ten Eyck* neither held by lease nor purchase, nor came within the provisions of the act. As two years elapsed between the act of 1793, and that of 1795, the latter act ought to receive the most limited construction, so as not to affect those who acted under the first act. If the tenancy under the lessor of the plaintiff was extinguished by the act of 1793, it was not restored by the act of 1795.

ALBANY,
August, 1808.

JACKSON
V.
WEIDEN.

[* 289]

VAN NESS, J. The lessors of the plaintiff derive their title from *T. C. Ten Eyck*, and rely altogether for a recovery on the ground, that in 1791, the defendant was *Ten Eyck's* tenant.

The defendant admits that, in 1701, he was the tenant of *Ten Eyck*; but he insists, that after *Ten Eyck's* death, and when the lessors of the plaintiff had succeeded to his rights, under his will, they dissolved the connection of landlord and tenant, and abandoned their claims to the premises. And it is admitted, that if this be so, there ought to be a new trial. One question submitted to the decision of the court, therefore, is, whether the defendant did not sufficiently make out his defence.

In 1793, on the application of certain persons claiming to have an interest in the *Kayaderoseras*, *Van Schaick's* and *Clifton Park* patents, the legislature passed an act for the appointment of commissioners to settle and establish the boundaries of their several tracts which were then in dispute. The commissioners appointed by this act, pursuant *thereunto, in 1794, made an award by which they determined that the premises in question were comprehended within the *Kayaderoseras* patent, and not in the patent to *Van Schaick*, under which *Ten Eyck* claimed.

[* 290]

The defendant proved, by *Benjamin Rosekrans*, that in March, 1806, *Waldron*, one of the lessors of the plaintiff, and the husband of the other lessor of the plaintiff, informed him that, upon the determination of the commissioners, he had given up all

ALFANY,
August, 1808.
JACKSON
V.
WELDEN.

claim to the lands, which, according to that determination, belonged to the *Kayaderosseras* patent; and that he did not censure the defendant for having purchased under the last-mentioned patent, but having recently been informed, that *Ten Eyck* did not sign the petition to the legislature for the appointment of the commissioners, he had renewed his claim to the lands.

From this it is evident, that *Waldron* knew of the submission to the commissioners, and of their decision, both of which, indeed, must have been facts of public notoriety. He expressly admits, that after the decision of the commissioners, and according to which he had no title to the premises, he had given up all claim thereto. He also knew, that in consequence of this decision, the defendant had purchased from the proprietors under the *Kayaderosseras* patent. But he says, that having recently been informed, that *Ten Eyck* had not united in the application to the legislature to pass the act of 1793, he had renewed his claim to the lands. That is, after he had, for nearly ten years, acquiesced in the determination of the commissioners, and supposed himself concluded thereby, not having, during the whole of that period, demanded rent from the defendant, but, on the contrary, abandoned all his claim to the land; having, by this means, encouraged the defendant to purchase from the *Kayaderosseras* proprietors, in whom the commissioners had determined the title to be valid; having, during this period, never considered the defendant in any respect as his tenant, he now renews his claim to the land. I think this claim comes too late, and that it would be unjust, after all that has taken place subsequent *to the determination of the commissioners, to permit the lessor, at this time, to consider the defendant as his tenant. He must be deemed to have been privy to and consenting to the defendant's attornment to the proprietors of the *Kayaderosseras* patent, and such an attornment, under the statute, is valid.

[* 291]

If the award of the commissioners is not conclusive as to the title, (about which I give no opinion,) the plaintiff ought, at least, to be compelled to show his title, which the defendant will then be in a situation fairly to meet; and if it should be found that the award is not conclusive, and that the premises are comprehended within the patent of *Van Schaick*, the defendant would then have his remedy against the proprietors, under the *Kayaderosseras* patent, to whom, it is to be presumed, he has paid a valuable consideration for the lands in question, and taken the necessary covenants to indemnify him, in case of a failure of their title.

On this ground, therefore, I am of opinion, that a new trial ought to be granted. And inasmuch as I think that the act of 1793, and the award of the commissioners, pursuant thereto, ought to have been permitted to be given in evidence, for the purpose of strengthening the testimony of *Rosekrans*, as to the

fact that the lessors of the plaintiff had abandoned all claim to ~~the~~ premises, and to show their acquiescence in the decision of ~~the~~ commissioners, I am also of opinion, that the costs ought to ~~abide~~ the event of the suit.

ALBANY,
August, 1808

JACKSON
v.
BLANSHAN.

SPENCER, J., and KENT, Ch. J., were of the same opinion.

THOMPSON, J., and YATES, J., not having heard the argument in the cause, gave no opinion.

New trial granted.

***JACKSON, ex dem. BURHANS, and BRACHIE, his Wife, [* 292]**
against BLANSHAN and BLANSHAN.

THIS was an action of ejectment, for lands in the town of *Hurley*, in the county of *Ulster*. The cause was tried before Mr. Justice *Spencer*, at the *Ulster* circuit, in 1807.

The lessors of the plaintiff claimed title under the will of *Matthys Blanshan*, the father of *Brachie*, one of the lessors of the plaintiff. It was proved that the defendants were in possession, and that the premises in question were part of the real estate of the testator, who died in 1790 or 1781, leaving six children, all of whom were dead, except *Brachie*, and all left issue, except *Matthew*; that *Matthew* died in 1804, and for several years prior to his death had not been in possession; and it was admitted, that he had mortgaged the premises to the loan officers of *Ulster*, by whom they were sold, and under whom the defendants claimed title.

The will of *Matthys Blanshan*, dated the 21st of *April*, 1770, was offered in evidence, and objected to, unless proved by a subscribing witness. It appeared that one of the subscribing witnesses was dead, that another was *non compos*, and that the third lived at *Poughkeepsie*, and no reason was shown why he was not produced. The will was, therefore, rejected.

The plaintiff then offered to prove that five sixths of the real estate of the testator in *Hurley*, had been held under the will. This was overruled by the judge, as not sufficient to entitle the will to be read in evidence.

The plaintiff then proved that the children of *Matthys Blanshan*

In order to entitle a will to be read in evidence, as an ancient deed without further proof than its production, it must be at least 30 years old, from the death of the testator; for the age of the will must be computed from the time of the testator's death, and not from its date.

Thus, where a will was dated in 1770, and a possession of the land was taken under it, and held from 1770 (when the testator died,) for 27 years, it was not allowed to be read in evidence, without proof of its execution. (a)

Where A. devised "all his estate, real and personal, to his six children, to

be equally divided between them, so are and share alike, but if any of them died before arriving at full age, or without lawful issue, that the his, her or their part or share, should devolve upon, and be equally divided among the surviving children, and to their heirs and assigns for ever." This was held to be a good devise over, by way of executory devise: and that the share of one of the sons who died without issue, after the death of four of the other children, who left issue, went to the only surviving child.

(a) *Jackson v. Thompson* 5 Cow. 178. *Jackson v. Christman*, 4 Wend. Rep 278. *Jackson v. Davis* 5 Cow. Rep. 127.

ALBANY,
August, 1808.

JACKSON
V.
BLANSHAW.
[* 293]

shan divided his real estate, after his death, into six equal parts and that *Matthew* took the premises in question for his share, and the children said that it was run out, according *to the will, and all the children were present, except *Brachie*, who had exchanged lands with one of the sons, *Johannis*, and given up her right, and it was then talked of, that if any of the children died without heirs, his or her part was to go to the survivors. The will was then admitted. After giving some legacies, the testator adds, "I give, devise and bequeath to my six children, *Johannis*, *Jacob*, *Matthew*, *Anne*, *Catharine* and *Brachie*, and to their heirs and assigns for ever, all the remainder of my real and personal estate, which I hold by patent, deed, bond, or any other instrument whatsoever, to be divided equally among them all, share and share alike, viz. each of my above-named six children to have the one sixth part of my estate, movable and immovable, which shall be in my possession when I depart this life; but if any one or more of my above-named children should die before they arrive at full age, or without lawful issue, that then his, her, or their part or share of my estate shall devolve upon, and be equally divided among the rest of my surviving children, and to their heirs and assigns for ever." The will was proved the 29th of *September*, 1781, by one of the subscribing witnesses, before the surrogate of *Ulster* county. It appeared that the other four children died before *Matthew*, leaving issue that were still living.

A verdict was taken for the plaintiff, subject to the opinion of the court, whether the will was properly admitted, and whether the lessors have any, and what interest in the premises.

It was agreed, that if the will was improperly admitted, that a nonsuit should be entered; if otherwise, and the plaintiff had no title, that then a verdict should be entered for the defendants; but if the will was properly admitted, and the plaintiff had shown a title to all, or any part of the premises, judgment was to be given for the plaintiff.

The following points were raised on the argument:—

1. Whether the will was properly admitted.
- [* 294] *2. Whether the limitation over, upon *Matthew's* dying without issue, was a valid limitation.
3. Whether *Brachie* alone takes, as sole survivor, or do not the words import a general failure of issue.
4. Or whether the issue of the brothers and sisters come in for a proportion.

L. Elmendorf, for the plaintiff. 1. The will was duly proved in the office of the surrogate of the county, and being more than 37 years old, it ought to have been received as an ancient deed, without further proof. A parish certificate of 30 years old, has been admitted in evidence, without giving any account of it (5 *East*. 259.) So deeds of thirty years' standing are admitted, without further proof of the execution than the pr

duction of them. (*Buller's N. P.* 255. *Peake's Ev.* 109, 110.) Besides, the will having been admitted by the parties who acted under it, that was sufficient, in an action of ejectment.

2. The devise over in the will was good, as an executory devise. In the case of *Fosdick v. Cornell*, (1 *Johns.* 440.) a similar question arose on a similar clause in a will, and all the cases on the subject were fully examined, and the court were unanimously of opinion, that the devise over was good. As four of the children died before *Matthew*, and he died without issue, the share of *Matthew* must go to *Brachie*, the only survivor.

Sudan, contra. 1. The presumption in regard to ancient deeds, exists only where there has been a continued possession, according to the deed. Here *Matthew* had been long out of the possession. Wills do not, like deeds, take effect from their date or delivery, but from the death of the testator; their age, therefore, is to be computed, not from the time they bear date, but from the period when they take effect. In the present case, the testator died in 1780 or 1781; so that, admitting the rule about ancient deeds, to be applicable to wills, yet, with this modification, the present will is not 30 years old, so as to entitle it to be read as an ancient deed.

*2. By the word *estate*, the testator devised both his real and personal property equally among his children. The personal property vested absolutely on their respectively attaining the age of 21 years, and any limitation over was void. As the object of all the rules of construction is to ascertain the intention of the testator, it is usual to resort to the devise of personal property, in order to find out the intention of the deviser as to his real estate; and to apply the same rule to the real as to the personal property. (*Fearne's Ex. Dev.* 190. 359. *Forth v. Chapman*, 1 *P. Wms.* 663.) If so, then it is clear, that each child, on arriving at the age of 21 years, would take a fee. (*Fearne's Ex. Dev.* 191.) Again, by the words "surviving children," it must be intended, that the grandchildren should take equally with the surviving child. (*Fearne's Ex. Dev.* 209. *Shep. Touch.* 417, 418.)

SPENCER, J. The questions in this case are, whether the will of *Matthys Blanshan* was well proved; and whether *Brachie*, the wife of the lessor, alone took the share of *Matthew*, one of the children of the testator.

It has been decided in this court, that a will stood upon the same footing as a deed, with respect to proof; and that an ancient will was subject to the same rule of evidence as an ancient deed. The will is dated the 21st of *April*, 1770; but the testator did not die until 1780 or 1781. A will does not take effect until the testator's death; but it conveys only the

ALBANY,
August 1808.
JACKSON
V.
BLANSHAN

[* 295]

ALBANY,
August, 1808.

JACKSON
v.
BLANSHAN.

[* 296]

lands of which he was seised when it was made, if the devise be ever so broad ; and, therefore, though not consummated until the death of the deviser, it relates back to the time of the devise. The reason of the law, in dispensing with the attendance of witnesses, to a deed of 30 years' standing, and where possession has been held under it, is founded on the presumption, that they are dead, and the impossibility of proving its execution ; and though they are, in fact, alive, it is not necessary to produce them, for the rule is general in its operation. The reason of this rule applies to the time of the execution of a will, and not to the death *of the testator, for the same difficulty of proof exists in the one case as in the other. I think, therefore, that when wills and deeds have the same principle applied to them, as respects their proof, it is following the analogy to consider a will as an ancient one, when 30 years have elapsed since its execution ; and that it may be read in evidence, where the possession has been held according to its provisions, for 27 years, as is the present case.

If this be correct, the production of the will, the proof that all the children held under it, and had divided the estate according to its provisions, was sufficient proof, *prima facie*, of its execution.

In the case of the *Governor & Company of the Chelsea Water Works v. Cowper*, (1 *Esp. Cas.* 275.) Lord *Kenyon* admitted a bond to be given in evidence, saying, that all deeds of above 30 years' date, proved themselves ; and that it added to its authenticity, coming from among the papers of the company, and being in the hand-writing of their secretary ; and a case is cited by Lord *Kenyon*, where Lord *Mansfield* declared that he would admit a bond of above 30 years' standing, if proved to have been found among the papers of the deceased. The ancient rule required the lapse of 60 years before a deed proved itself ; this rule has been narrowed to 30 years, and, as by our statute of limitations, the possession of land for 25 years gives a title against all the world, I consider a deed of more than 30 years' standing, and where possession has been held under it for 25 years, good evidence, without proving its execution.

The devise is to the testator's six children, and their heirs and assigns for ever, as tenants in common. But if any one or more of the children should die before they arrive to full age, or without lawful issue, then his part is to devolve upon, and be equally divided among the rest of the testator's surviving children, and to their heirs and assigns for ever. *Matthew* died without issue, after the death of four other of the devisees with issue, leaving *Brachie* the only surviving child of the testator

[* 297]

*Though the real and personal estate are both given in the same manner, it would be violating the plain intention of the testator, to consider this a void limitation over, because the personal estate might admit of other constructions ; and since the case of *Fosdick v. Cornell*, it cannot be contended that the

devise means an indefinite failure of issue, but only a failure of issue living at the death of the first taker. That case is an authority for saying that the devise here created a good limitation over, by way of executory devise, depending on the contingency of any of the devisees' dying, without leaving issue at the time of their death.

ALBANY,
August, 1808.

JACKSON
v.
BLANSHAN

The grandchildren cannot be considered as the surviving children, within the intention of the testator. The plain language of the limitation would be violated, by giving it such a construction, and, indeed, it was not pressed.

In my opinion, *Brachie* took the whole share of *Matthew*, on his dying without issue, and the plaintiff is entitled to judgment.

KENT, Ch. J. The first question arising in this case is, as to the admission of the will of *Matthys Blanshan*.

The acts and declarations of the children might, perhaps, have been sufficient ground for presuming a will dividing the estate, according to the distribution which actually took place, had there not been positive proof behind of the existence of the will. Presumptions are only allowed when positive proof is wanting; but here the lessors of the plaintiff admitted, that they had in their hands the will itself. They were then bound to produce it, and support its genuineness by such proof as the nature of the case afforded. The highest and best evidence was the production of one or more of the subscribing witnesses to the will, if they were living, and within the jurisdiction of the court. It was proved that one of the subscribing witnesses was alive, and resided in *Dutchess* county, and no reason was given why he was not produced. This omission was a fatal negligence on the part of the plaintiff; unless the admission of the will can be supported on the footing of an ancient deed, which proves itself. Here I think also, the lessors of the plaintiff have failed. It is not proper to compute the will from its date, but only from the time that possession took place under it. It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed. (*Gilb.* 89. *Peake*, 72, 73. *Fleta*, 426. 1 *Inst.* 6. 1 *Roll. Rep.* 132. *Skinner*, 239. 2 *Mod* 323. 2 *Term*, 466. 1 *Black. Rep.* 532.) In one of the cases referred to, Lord *Coke* says, that possession must have gone all the time, according to the deed, before a feoffment of 40 years' standing can be admitted, without proof of livery. Where possession fails, the presumption in its favor fails also. The length of the date will not help the deed, for if that was sufficient, a knave would have nothing to do but to forge a deed with a very ancient date. The death of the testator could not have exceeded 26 or 27 years, before the commencement of the suit, and the time of the possession under the will fell short of the lowest period which has been required to establish an ancient deed.

[* 298]

Perhaps 30 years may be deemed unreasonably long, since

ALBANY,
August, 1808.

JACKSON
v.
BLANSHAN.

it reaches beyond the limitation now established in a writ of right. But it is to be observed, that the rule requiring 30 years as the test of an ancient deed, is an old and well settled rule of evidence; and that it has been applied to a variety of instruments, besides conveyances of real estate, such as bonds, certificates of settlement, and the like. It may, therefore, well be questioned, whether greater inconveniences would not be felt from a departure from that rule, than from adhering to it, in the present instance.

On this ground, a judgment of nonsuit ought to be directed, according to the stipulation in the case. But as we have the will before us, and the counsel have argued on the merits of the controversy, arising on the construction of the will, it may, probably, be convenient to the parties, *and save further litigation, to have the opinion of the court on the will.

[* 299]

The will devises the real estate to the six children, in fee, of whom *Brachie*, one of the lessors, was the youngest, and the only survivor; it then adds the following devise over: "But if any one or more of my said children should die before they arrive at full age, or without lawful issue, that then his or her share should devolve upon, and be equally divided among the rest of my surviving children." This devise over is good by way of executory devise, and not too remote; for the construction is well settled, that the words "without lawful issue" mean *issue living at the time of his death*. The case of *Fosdick v. Cornell* (1 Johns. 440.) was on a devise to four sons and a daughter, and that if any of them should die, without heirs male of their bodies, their share should go to the survivors. The court reviewed the leading authorities, and held that the devise over was a good executory devise, and that the true construction was, a devise over, to take effect on failure of male issue, *during the life of the first taker*. The case of *Hanbury v. Cockerill* (1 Rol. Abr. 835.) is an ancient case, quite analogous, in favor of the validity of this executory devise. The devise there was to the two sons in fee, with a proviso, that if either died before they should be married, or *before they should attain the age of 21 years, and without issue of their bodies*, then his share should go to the survivor. In the two cases of *Porter v. Bradley*, and *Roe v. Jeffery*, (3 Term, 143. 7 Term, 589.) Lord *Kenyon* supported this established construction, in a very forcible manner; and the present case can not be distinguished, in principle, from those in which this rule of law is settled beyond controversy. The lessors of the plaintiff would, therefore, be entitled to recover on the merits of the case, and it is with regret that I am obliged to turn them round to a new action; but, according to the stipulation in the case, there must be a judgment of nonsuit.

[* 300]

*VAN NESS, J., was of the same opinion

THOMPSON, J., and YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment of nonsuit.

ALBANY,
August, 1808
JACKSON
v.
TODD.

JACKSON, *ex dem.* DUNBAR and others, *against* TODD.

THIS was an action of *ejectment*, for a lot of land, in the township of *Marcelus*, in the county of *Onondaga*. The cause was tried at the *Onondaga* circuit, on the 4th *June*, 1806, before Mr. Justice *Livingston*.

At the trial, the plaintiff produced in evidence, the patent for the lot in question, to *William Dunbar*, dated the 8th *July*, 1790, and a deed from him to *Zebulon Macey*, for the same lot, dated the 8th *March*, 1784, which had been duly acknowledged and recorded. He then offered a transcript of a record of a deed from *Macey* to *Zephaniah Platt*, dated the 23d *June*, 1794, by which he released and quitclaimed to him, all his right and title to the lot in question. This deed was proved, the 5th *September*, 1797, before a master in chancery, whose certificate was endorsed on the deed, as follows:—

"Before me," &c., "came *William Thorn* of *Dutchess* county, and I, knowing him to be the subscribing witness to the within deed, and having satisfactory evidence that he knew *Zebulon Macey*, who executed the within deed, by the affirmation of the said *William*, who declares that he knows the said *Zebulon*, and that he is the same person described in the said deed, and the said *William* being thereupon duly affirmed, says, that he saw the said *Zebulon* execute the said deed," &c.

The deed was recorded in the office of the clerk of *Onondaga*, the 11th *September*, 1798.

The counsel for the defendant objected to the reading of the transcript of the record of this deed, because the proof was insufficient, and not made according to law, so *as to entitle it to be recorded. The judge, considering the objection well founded, rejected the transcript. The attorney of one of the lessors of the plaintiff was then called to prove the loss of the original deed, who testified, that by request of one of the lessors of the plaintiff, he made inquiry at the office of the clerk of *Onondaga*, for the original deed, which had been left there to be recorded, and that he and the clerk made diligent search in the office, but could not find the deed.

The plaintiff further offered to prove, that the original deed was produced and proved before the *Onondaga* commissioners, and that the contents were the same as the transcript then produced; this was objected to, but the objection was overruled by the judge.

A deed for a military lot of land, in the county of *Onondaga*, dated in *June*, 1794, and proved the 5th of *September*, 1797, in the manner prescribed by the act of the 11th *February*, 1797, relative to the proving and recording of deeds, was held sufficiently proved to be recorded; and a transcript of the record of such a deed so proved, may be read in evidence. Evidence by a person that he had delivered a deed to the clerk of the county to be recorded, and that search had been made in the clerk's office, and that it could not be found, is not sufficient

[* 301]

evidence of the loss of a deed, to entitle the party to read a copy in evidence, unless it be shown, that the deed was never re-delivered by the clerk.

ALBANY.
August, 1808.

JACKSON
v
TODD

Vincent Matthews, Esq., late one of the *Onondaga* commissioners, was then called as a witness, who said, that the attorney of *Platt*, one of the lessors of the plaintiff, in *October*, 1799, produced to the commissioners a deed from *Zebulon Macey* to *Zephaniah Platt*, which he believed to be of the same tenor as the transcript then produced, though he could not be positive in his recollection.

It appeared, also, that the persons under whom the defendant claimed the lot of land in question, were parties to the litigated title to the lot, before the commissioners. The judge was of opinion, that there was sufficient evidence of the existence and contents of the deed, and of its being lost; and the jury found a verdict for the plaintiff.

A motion was made to set aside the judgment, and for a new trial:—

1. Because the judge was not correct in deciding that sufficient evidence had been given of the existence and loss of the deed from *Macey* to *Platt*.

2. Because he was incorrect in ruling, that sufficient evidence of the execution and contents of the deed had been given.

[* 302]

Gold, for the defendant. There was no proof of the execution of the deed from *Macey* to *Platt*. *Matthews*, *who was called to prove that the original deed was produced before the *Onondaga* commissioners, is entirely silent as to its execution; nor was there any evidence of its being before the jury. If the deed was not so proved as to allow it to be recorded, the transcript could not be read in evidence.

The case of *Jackson*, ex dem. *Ramson & Roe*, v. *Shepard* (2 *Johns*. 77.) is in point. The act of the 8th *January*, 1794, (7 sess. c. 1.) required all deeds for military lands, before executed, to be deposited with the clerk of *Albany*, who was to deliver them over, before a certain time, to the clerk of *Onondaga* county, and provides that they shall be considered as recorded, from the time they are so delivered. The deed in question was executed *June* 23d, 1794, since the passing of that act, and it was necessary that it should be regularly proved and recorded, according to the general act for the registry of deeds.

Again, there was not sufficient evidence of the loss of the deed. The clerk of the county of *Onondaga* was not called as a witness; and it may be, that he delivered it again to the grantee, or to some other person. *Matthews* testifies that there was a deed which he believed to be similar to the transcript; but he was not positive, and he gave no evidence of its execution. This is too slight evidence of the contents of the deed, supposing it to be lost.

J. Tallmadge, contra. The act of 1794 was repealed by the revised act of the 6th *April*, 1801, (*Rev. Laws*, v. 1 p. 232

460.) and according to the doctrine contended for, on the part of the plaintiff, deeds executed prior to that date cannot be recorded. The deed was duly proved according to the act of the 11th *February*, 1797, and the 5th section of the act of the 12th *February*, 1798, relative to deeds for lands in *Onondaga*, refers to and recognizes the act of the 11th *February*, 1797, as to the mode of acknowledgment and proof; and allows deeds so acknowledged or proved, to be recorded. This was a virtual repeal of the act of 1794, as to the recording of such deeds. The deed, then, having been duly *proved and recorded, the transcript ought to have been received in evidence.

ALBANY,
August, 1803
JACKSON
v.
TODD.

[* 303]

But if the transcript was not of itself evidence, yet, when connected with the parol proof, there was sufficient evidence from whence to infer the existence of the deed, its due execution, and subsequent loss.

VAN NESS, J. Admitting that the transcript of the record of the deed from *Macey* to *Platt*, ought not to have been admitted in evidence, there ought, notwithstanding, to be a new trial, unless the evidence given of the loss, execution and contents of the original deed entitled the plaintiff to a verdict. The transcript was not in evidence; and, consequently, the defendant has had no opportunity to contest its validity, which it was competent for him to do, notwithstanding it may have been duly acknowledged and recorded. Had it been produced in evidence, he might, perhaps, have proved it to be a forgery, or that it had been obtained by a fraud or imposition, or have shown some other fact which would have rendered it void or inoperative; or he may have a good and perfect title to the lot in dispute. I am of opinion that the deed from *Macey* to *Platt* was duly proved and recorded, and that the transcript offered on the trial ought to have been admitted in evidence. But for the reasons I have mentioned, that will not help the plaintiff. The question, then, is, whether the other testimony given on the trial, entitles the plaintiff to retain his verdict. I think not. The general rule is, that where a party is permitted to give parol evidence of the contents of a deed, or other writing, he must first prove the original to be lost or destroyed.

The party claiming under a conveyance, is presumed to have the custody of it. For aught that appears, the deed in question may, at the trial, have been in the possession of the lessors of the plaintiff, or one of them; they ought, at least, to have shown, as far as it was in their power, that such was not the case.

*Had the clerk been examined, he might, perhaps, have proved, that the deed had been found subsequently to the time of the search made by *Walter Wood*. The lessors of the plaintiff ought to be held to strict proof on this subject, for they may, for improper purposes, have withheld the original deed. But however this may be, there is another, and, as I think, an

[* 304]

ALBANY,
August, 1808

JACKSON
v.
TODD

insuperable objection to the plaintiff's right to recover on this evidence.

The execution of the deed by *Macey* is not proved by any of the witnesses. The transcript having been excluded, no evidence of the execution of the deed arising from it, can be taken into consideration. Neither *Wood* nor *Matthews* knew any thing about the execution of it; and taking it for granted, that there was sufficient evidence of the contents of the paper mentioned by *Matthews*, it is not shown that that paper was the deed of *Macey*.

I am, therefore, of opinion, that there ought to be a new trial.

SPENCER, J. Two questions were made on the motion for a new trial.

1st. That the proof of the loss of the deed from *Zebulon Macey* to *Zephaniah Platt* was incompetent; and, if otherwise, that there was no proof of the contents of the deed.

2d. That the transcript of the record offered in evidence was correctly overruled, the same not having been authenticated as the law required.

I think it was sufficiently proved, that the deed in question had been in the hands of *Walter Wood*, and, afterwards, in the hands of the clerk of *Onondaga*; but there is no proof that he had not re-delivered it, after it was recorded. The evidence of a search in the office, would not tend to create any presumption of its being lost, unless it was proved that it was not re-delivered. But there is no proof of its execution, nor of its contents, independently of the probate endorsed on the deed. If it had been proved before the *Onondaga* commissioners, of which there is no evidence, it would not be competent to give that proof in evidence, unless the witnesses were dead. Mr. *Matthews*, the commissioner, does not take upon himself to say, that the deed before him comported with the transcript. The evidence, therefore, was improperly admitted.

There is some confusion in the acts relating to the proof or acknowledgment of deeds for lands lying in the military tract. The act of the 8th *January*, 1794, inhibits the recording of any deed for military bounty lands, unless it be acknowledged by the party making it; and the officer who takes the acknowledgment, is required either to have personal knowledge of the grantor, or proof of his identity. The act of the 11th *February*, 1797, is general in its nature, making no exceptions as to the military bounty lands, and prescribes the method of acknowledgment and proof of deeds, without any reference to their date, so as to guard against forgery, or a personating of the grantors. The 5th section of the act of the 12th *February*, 1798, declares that no deed executed on or before the 1st day of *May* antecedent, relating to any lands in *Onondaga*

county, shall be thereafter registered or recorded, unless it be acknowledged or proved, according to the act of the 11th *February*, 1797. In the 8th section of the act of the 6th *April*, 1801, it is provided, that so much of the act of the 8th *January*, 1794, as provides for the acknowledgment or proof of deeds in a manner different from the provisions of that act, shall be repealed, so far as respects conveyances thereafter to be made.

ALBANY,
August, 1808.
JACKSON
v.
TODD.

The deed in question was executed on the 23d day of *June*, 1794, and was proved on the 5th *September*, 1797, according to the directions of the act of the 11th *February*, 1797. The 5th section of the act of the 12th *February*, 1798, by prohibiting the recording of deeds, unless proved as this deed is, virtually repealed the act of the 8th *January*, 1794, and the subsequent repeal of so much of that act, as provided for the proof or acknowledgment of deeds different from the provisions in the act of the 6th *April*, 1801, so far as respected future conveyances, cannot, by any just construction, qualify or derogate *from the legal operation of the act of the 12th *February*, 1798.

[* 306]

I am, therefore, of opinion, that the deed in question was well proved and recorded, and ought to have been permitted to be read. But as the transcript of the record was not admitted in evidence, and the plaintiff obtained a verdict on incompetent proof, lest the defendant, relying on his objection to that proof, may not have exhibited his defence, there must be a new trial, with costs to abide the event of the suit.

KENT, Ch. J. After a careful analysis of the several acts relative to the military bounty lands, I am not able to concur in the opinion, that the deed from *Macey* to *Platt* was duly proved and acknowledged. I am happy, however, that my brethren have seen reason to put a different construction upon those acts, because the one they have adopted is more convenient, especially where the original grantor is dead.

On the second point in the case, I have also been of a different opinion from the one given, and it was, in some measure, a consequence from that adopted on the first point.

Under the peculiar circumstances in which those deeds were placed, by the construction which the judge adopted at the trial, (and which I think the true one,) the parol proof appeared to me sufficient to let in the transcript from the record, as a copy of a lost deed. But I wish not to press this point more than the other, as the case cannot well occur again. The marks of authenticity which the copy received from the fact of its being recorded, though not sufficient to render it, *per se*, evidence, yet gave it a weight in the scale of evidence which no other copy could have received, and warranted an inference, from slighter circumstances than are requisite in ordinary cases, of the existence, proof and loss of the original.

ALBANY,
August, 1808.
RICHARDS
v.
MARINE INS.
COMPANY.

THOMPSON, J., and YATES, J., not having heard the argument of the cause, gave no opinion.

New trial granted.

[* 307] *RICHARDS *against* THE MARINE INSURANCE COMPANY.

Goods were insured from *Nevitas*, in the island of *Cuba*, "beginning the adventure, &c. from and immediately following the lading thereof on board of the vessel at *Nevitas*, in *Cuba*." The vessel sailed with a cargo of goods from *New-York*, and arrived at *Nevitas*, but not being allowed to land the goods there, except a few trifling articles, she sailed again from *Nevitas*, with the outward cargo on board, for *Jamaica*; and while proceeding to that place, was wholly lost by the perils of the sea. It was held, that the policy did not attach to the *outward cargo*, which continued on board at *Nevitas*, and until the vessel was lost, and that the insured

THIS was an action on a policy of insurance on goods, "laden or to be laden on board the schooner called the *Beaver*," &c., from *Nevitas*, in the island of *Cuba*, to *New-York*, "beginning the adventure, &c. from and immediately following the lading thereof on board of the said vessel at *Nevitas* in *Cuba*."

The cause was tried at the *New-York* sittings, on the 23d April, 1806, before Mr. Justice *Spencer*.

The vessel sailed from *New-York*, on the 6th September, 1802, with a cargo of flour, lard, &c. She arrived at *Nevitas*, but was permitted to sell a small part only of her outward cargo there, and the master set sail, on the 16th October, 1802, for the island of *Jamaica*, with the residue of the outward cargo, with which the vessel had arrived at *Nevitas*, except some trifling articles that had been sold at the latter place. While proceeding from *Nevitas* for *Jamaica*, the vessel was wholly lost by the perils of the sea.

The defendants, on the trial, insisted, that no cargo having been put on board the vessel at *Nevitas*, and that she having sailed with the same cargo that she brought from *New-York*, the policy never attached; and that, consequently, the plaintiff could only be entitled to a return of premium. The judge being of that opinion, the jury, by his directions, found a verdict for the plaintiff, for the amount of the premium only.

The plaintiff moved for a new trial on three grounds.

1. That the goods on board at *Nevitas*, being part of the original cargo, intended for a trading voyage, the policy attached on the goods actually on board at that place.

2. Because of the discovery of new and material evidence.

3. Because of the misdirection of the judge.

[* 308]

could only recover back the premium he had paid.

*The affidavit of the newly discovered evidence, stated that the plaintiff, being embarrassed, had assigned the policy to *Abraham King* and *Andrew Cock*, for whose benefit the suit was brought; that the plaintiff afterwards removed to the county of *St. Lawrence*, where he now resides; that since the trial, the assignees had been informed, for the first time, that the defendants, prior to the date of the present policy, had subscribed a policy of insurance on the same cargo, on board of the same vessel, on her outward voyage from *New-York* to *Nevitas*, and that such policy was subscribed with a full knowl-

edge that permission could not be obtained at *Nevitas*, to land the outward cargo there, and that the policy on which this suit was brought, was intended to cover the outward cargo on board at and from *Nevitas*.

ALBANY,
August, 1808

RICHARDS
v.
MARINE INS
COMPANY

Colden, for the defendants, relied on the case of *Graves and Scriba v. The Marine Insurance Company*, (2 *Caines*, 339.) the doctrine of which, he said, was confirmed by a similar decision, in *Robinson and Thompson v. French*, (4 *East*, 130.) in *England*.

Hoffman and *Harison*, for the plaintiff, contended, that the present case was distinguishable from that of *Graves and Scriba v. The Marine Insurance Company*, and came within the decision of *Vredenberg v. Gracie*, cited (from MS.) by Mr. Justice *Livingston*, where the policy was considered as attached to the outward cargo, because the underwriters were informed that the goods intended to be insured were shipped at *New-York*, and were designed for a trading voyage in the *West-Indies*, where it is not usual to carry the produce of one island to another.

SPENCER, J., delivered the opinion of the court. I continue to be of the same opinion I gave on the trial of this cause, that the policy never attached. Since the decision of the case of *Graves and Scriba v. The Marine Insurance Company*, I should have supposed the point at rest in this court. It cannot be necessary to reiterate an opinion on facts so precisely similar. This policy declares the adventure to be "upon goods and merchandises from and immediately *following the lading thereof on board the said vessel at *Nevitas*." Now no goods were so laden, but the cargo had been on board from the time of the vessel's sailing from *New-York*. According to the grammatical construction, and the understanding of the parties, to be deduced from the use of expressions perfectly well settled by decisions, and explicit in themselves, the subject-matter of the insurance was goods to be taken on board or laden at *Nevitas*.

[* 309]

To bring this case within that of *Vredenberg v. Gracie*, an affidavit has been produced, made by the assignees of the policy, that the defendants underwrote another policy on the cargo of the same vessel, from *New-York* to *Nevitas*, and prior in date to the policy now in question, with the full knowledge, on the part of the defendants, that permission could not be obtained at *Nevitas*, to discharge the outward cargo there, and that this policy was intended to cover and insure the outward cargo laden at *New-York*.

I do not feel myself called upon to say, whether these facts would, or would not bring the case within that of *Vredenberg v. Gracie*, there having been no good reasons offered, for not

ALBANY,
August, 1808.

DELAFIELD
v.
HAND

introducing the evidence at the trial. There can be no pretence of surprise on the party or counsel, and there was gross laches in not producing the proof, if it existed.

The court are, therefore, of opinion, that the plaintiff can take nothing by his motion.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Rule refused.

[* 310]

*DELAFIELD *against* HAND.

Copies of the proceedings or decrees of foreign courts or tribunals, though under the hands and seals of the officers of such courts, are not, of themselves, evidence, but must be proved like other facts. (a) The delivery of a paper by a plaintiff, in an action on a policy of insurance, to a broker, to enable him to adjust a loss, will not make that paper good evidence in another suit, brought by one of the parties, against the master of the vessel insured.

THIS was an action of *assumpsit*. The declaration contained two counts, for money had and received to the use of the plaintiff, and for money paid, &c. Plea, *non assumpsit*.

At the trial, the plaintiff proved that he was an insurer for 1,000 dollars, on the *freight* of the ship *Sophia*, of which the defendant was master, and owner of one third, on a voyage from *New-York* to *Havre de Grace*, in *France*, in the year 1801; that the ship, having performed eight ninths of her voyage, was captured and carried into *Ramsgate* in *England*, in *September*, 1801, and remained there several months, when she was liberated, with her cargo, and proceeded to *Havre*.

The plaintiff then called for an exemplification of certain proceedings of a tribunal at *Havre*, and the defendant produced a translation (admitted to be correct) of those proceedings, without any other evidence of their authenticity, than what appeared from the papers themselves. The defendant objected to the reading of them, but the plaintiff proving that the same translation had been put into the hands of *John Ferrers*, a broker, by *Elisha Leavenworth*, in certain suits brought by *Leavenworth* against the present plaintiff, on policies of insurance on the same vessel, for the same voyage, in order to an adjustment of the average loss, (1 *Caines*, 573.) the judge admitted the paper.

This paper contained a history of a suit instituted before the tribunal of commerce at *Havre*, by the present defendant, against citizens *Begouen*, *Demeaux & Co.*, merchants and consignees of the cargo of the ship *Sophia*, for the freight of the cargo, to the amount of 7,520 52-100 francs. The consignees resisted the demand, on the ground, that part of the goods were not delivered, and *part were injured by bad stowage. The captain alleged, as an excuse, that part of the cargo had been stolen, while the ship was in *England*, and produced his three protests, the first of which stated that the vessel was cap

[* 311]

tured, and carried into *Ramsgate* in *England*. The second, made on the 18th of *January*, 1802, stated a robbery, about the 1st of *November* preceding, while the master was gone to *London*, to obtain the release of the vessel, and which, he had reason to believe, was committed by two of the officers of the vessel, as, on being questioned concerning it, they absconded: and that the ship was released on the 22d of *December*. The third protest was on the 8th of *February*, 1802, and stated, that the ship having been detained at *Ramsgate*, by contrary winds, a second robbery was discovered, on the 1st of *February*; that he applied to the magistrates of the place, and took measures to discover the persons who had stolen the goods; and suspecting three of the crew, they were examined before a magistrate, and were discharged; that he consulted with the merchants in *London*, as to further steps to be taken to discover and apprehend the plunderers, but they advised his departure, without prosecuting the inquiry further. The court holding the captain of a ship answerable for the acts of his crew, and that the second theft was committed by the crew, or arose from their negligence, and that some of the goods were badly stowed, adjudged, that the captain was answerable for the second, though not for the first, theft. The value of the goods lost by the first theft was 774 1-12 francs, and by the second theft, 5,218-60 francs. The consignees were adjudged to pay 7,520-52 francs, according to the demand of the captain, but 504-14 francs were directed to be deducted from the amount of the freight of the goods not delivered, which reduced the judgment to 7,016-38 francs. The captain and the ship were adjudged to pay to the consignees, for the goods stolen, and for the damage of goods badly stowed, 5,692-60 francs, *and this sum was deducted from the demand of the master for freight.

ALBANY.
August, 1808.
DELAFIELD
V.
HAND

[* 312]

The defendant then read in evidence the three protests above-mentioned.

It further appeared, that *Elisha Leavenworth* owned two thirds of the *Sophia*, and had brought suits against the plaintiff, as insurer on the freight and vessel, for himself and the present defendant, and that the present plaintiff was compelled to pay to *Leavenworth* the full amount of his two thirds of the freight insured, or 220 dollars 23 cents more than he would have been liable for, if the full amount of the freight of that part of the cargo delivered at *Havre*, had been accounted for and allowed him in the adjustment.

The plaintiff contended that the defendant could not charge the value of the goods stolen to the insurers on the freight, and was himself answerable for the theft.

A verdict was taken for the plaintiff, by consent, for 251 dollars 43 cents, being the principal and interest, subject to the opinion of the court; the judge being of opinion, that if

ALBANY,
August, 1808.

DELAFIELD
v.
HAND.

the plaintiff was entitled to principal, the interest ought to be allowed.

The cause was argued by *Pendleton*, for the plaintiff, and *Riggs*, for the defendant.

As the court decided on a preliminary objection, as to the admissibility of the written evidence, it is unnecessary to state the arguments, at length, on the merits of the case.

It was contended, on the part of the plaintiff, 1. That the decision of the tribunal at *Havre*, as to the liability of the master for the goods stolen, was correct; and that the master, having applied a part of the freight to make good the loss, the owner was liable for the amount so applied to the insurer on the freight, who had paid a total loss.

2. That the insurer on freight could, in no event, be affected by a loss of the goods; for as the goods had arrived at their port of destination, the freight ought not to have been made liable for the goods stolen or lost.

[* 313]

*The counsel for the defendant insisted, that from the time of the capture until the restoration of the vessel, she must be considered as under the restraint of a superior force, during which the master was not liable for any accidents, until the vessel was again on the high sea; that the law relative to common carriers was not applicable to the case of a vessel so detained by a belligerent; that if the owner of the vessel, or master, were liable for the loss to the owner of the goods stolen, still the insurer could not maintain this action; and if he could, he ought to have made the claim when the action was brought against him on the policy of insurance: That an action for money had and received to the use of the plaintiff could not be maintained, unless it was shown that the money had actually been received by the defendant, which was not the case here, and there was no evidence that any money was paid to the defendant.

That the translated copy of the proceedings and decree of the tribunal at *Havre*, not having been proved or authenticated in any manner, was wholly inadmissible; that it would be a most loose and dangerous practice to allow copies of the proceedings of foreign tribunals to be evidence of themselves; and that the mere putting of the paper into the hands of a broker, by the plaintiff, in another cause, could not make it evidence in this suit, between different parties.

YATES, J., delivered the opinion of the court. This is an action for money alleged to have been received by the defendant, in consequence of an adjudication of a *French* tribunal, and claimed by the plaintiff. The propriety of the remedy now sought for may, perhaps, be controverted on legal grounds; but a preliminary question arising, the determination of which, in the opinion of the court, renders such inquiry unnecessary, I shall proceed to examine the question, whether an exempli-

cation of certain proceedings of a tribunal at *Havre de Grace*, and objected to, on the trial, was legally admitted in evidence.

*It is undoubtedly a general rule, that every country recognizes the seals of its own tribunals, without any further proof accompanying them. The reason is evident, because it is taken for granted, that the seals of those courts are of such public notoriety, as to carry with them intrinsic evidence of their verity. This doctrine is recognized by *Gilbert*, in his *Law of Evidence*, (p. 16.) where it is called, by him, a part of the constitution of the courts.

Among the acts of public officers abroad, those of a notary public are, perhaps, the only acts partaking of such universality, as to be generally received in courts of justice. The liberal extension of the rule of evidence, in this instance, the intercourse between merchants has rendered indispensable.

The evil consequences resulting from the doctrine contended for on the part of the plaintiff, are too evident to require many observations to evince the impropriety and danger of receiving the attestations of foreign tribunals in evidence in our courts. Of what notoriety can such a seal be in this country? The extension of the rule insisted on by the plaintiff would open the avenues of fraud and imposition, in our courts, and, in many cases, prove ruinous to parties. How easily might fabrications of foreign records be successfully introduced, without the prospect of detection within a reasonable time, and often leave the party without a remedy! For these reasons, we think that such attestations should be received by the court, as other matters of fact, and subject to the same rules of evidence. This rule was fully established in the case of *Simmerton v. Goddard*, (9 *Mod.* 66.) and in the case of *Henry v. Adey*, (3 *East*, 221.)

But it is stated, that the plaintiff proved that a translation of the proceedings of the tribunal at *Havre de Grace*, produced in court as evidence, had been put into the hands of Mr. *Ferrers*, the broker, by the plaintiff, in certain suits commenced against the present plaintiff and others, in order to make an adjustment pursuant to the determination *of the court in those cases. This, it is said, ought to preclude all objection on the part of the defendant in this cause. It does not appear, from this testimony, that such a privity exists between *Leavenworth* and the defendant, as to conclude him from making the objection. *Leavenworth* was not his authorized agent; besides, if that were the case, I cannot discern why a delivery of a paper in one cause should be deemed to conclude a person from objecting to its authenticity in another action. This testimony, therefore, does not remove the legal objection to the admission of the record of the *French* tribunal. As this decree appears to be the basis of the plaintiff's action, it is not now necessary to inquire what would be the effect on his right of recovery, if it had been authenticated by legal proof. The verdict

ALBANY,
August, 1808.

COOPER
v.
HEERMANCE.

having been taken subject to the opinion of the court, a nonsuit must be entered.

THOMPSON, J., not having heard the argument in the cause, gave no opinion. •

Judgment of nonsuit

COOPER *against* HEERMANCE.

to a plea of a discharge under the insolvent act, the plaintiff replied, that the defendant had procured a creditor to sign his petition and make affidavit

[* 316]
for a larger sum than was due to him; and that he had concealed a debt due to him, which he did not insert in his inventory, and also that he had been guilty of perjury. On a demurrer, the replication was held bad, as containing three distinct and independent grounds for avoiding the discharge, which would require several distinct points to be put in issue

THIS was an action of *debt*, on a judgment. The defendant pleaded his discharge under the act, entitled "An act for giving relief in cases of insolvency." The plaintiff replied, that the defendant, at the time of presenting his petition to the judge for relief, under the act, was indebted to one *Hans Kiersted*, in the sum of 500 dollars, and in order to obtain his discharge, procured *Kiersted* to become a petitioning creditor for a larger sum than was *really due to him from the defendant, to wit, the sum of 4790 dollars and 73 cents, and that *Kiersted* signed the defendant's petition, and made the affidavit for that sum, according to the act. The plaintiff also replied further, that the defendant, at the time of presenting his petition, was indebted to the plaintiff, in the sum of 251 dollars and 15 cents, and that the defendant fraudulently concealed the amount of the debt so due to the plaintiff; and further, that one *Elizabeth Cooper*, administratrix of *Ananias Cooper*, deceased, was indebted to the defendant, at the time of presenting the petition, in the sum of 263 dollars and 77 cents, which debt was a part of the estate and effects of the defendant; and that the defendant delivered to the judge, at the time of presenting his petition, an inventory of all his estate, real and personal, &c., and made oath to the same, and did falsely swear that the inventory so by him presented was, in all respects, just and true, when, in fact, the said inventory was not just and true; and that the debt so due to him from the said *Elizabeth Cooper*, administratrix, &c., was not mentioned, or set down in the inventory, but was fraudulently concealed by the defendant, whereby the defendant was guilty of perjury, &c.

To this replication the defendant demurred specially, and assigned for causes of demurrer,

1. That the replication attempts to put in issue, several and distinct matters.

2. That the replication is double in alleging, by way of avoiding the discharge of the defendant, several and distinct matters, each of which, if true, and rightly pleaded, would have avoided the discharge, thereby tending to introduce a multiplicity of issues on the record.

3. That the replication is multifarious, and presents a variety of points, but not one single point on which issue can be joined, &c

ALBANY,
August, 1808

COOPER
V.
HEERMANCE

Slosson, in support of the demurrer. The replication in this case is similar to the one in the case of *Service v. Heermance*, (2 *Johns*. 96.) and which the court determined to be bad. *It presents three distinct and independent grounds for avoiding the defendant's discharge, each being a distinct point, and concluding with a verification. This kind of *duplicity* in pleading is not permitted. The statute allowing several pleas to be pleaded, does not apply to replications, and by the common law, double pleas are not allowed. (*System of Pleading*, 222. 5 *Comyn's Pleader*, E. 2. 3 *Bl. Com.* 308. 1 *Plowd.* 140. a.)

[* 317]

Colden, contra. The replication alleges that the discharge is void, because obtained by fraud. Fraud is a single ground or point, and the party may set forth several facts and circumstances in this replication to show the fraud.

In the case of *Service v. Heermance*, (2 *Johns*. 96.) the court said that a replication of fraud generally would not be sufficient; but that the plaintiff must specify the acts on which he means to rely, as fraudulent.

In the case of *Ashton v. Sherman*, (1 *Ld. Raym.* 263. 2 *Saund.* 48.) which was an action of debt against an administrator, the defendant pleaded six judgments against him on bonds, and *nil assets ultra*; the plaintiff replied, that four of the judgments were obtained by fraud, and as to the other two, the defendant had *assets*, &c., and the replication was held not to be double.

All the facts here stated, in the replication, constitute one defence against the defendant's discharge, that is, fraud. (5 *Bac. Abr. Pleas. K.* 444.) The reason of the ancient rule, as to the duplicity of pleading, is not satisfactory. For there can be no great inconvenience, in putting several and distinct matters at issue, and having several issues to be tried. These cases, where fraud is set up in avoidance, may be considered as exceptions to the general rule.

Harrison, in reply. If any number of pleas were allowed, requiring various issues, it would produce much embarrassment in practice. If the act had said, generally, that all discharges obtained by fraud should be void, it might have been sufficient, to have replied, generally, that the discharge was obtained by fraud. But as the particular acts or frauds are specified, each act or fact becomes a *distinct and sufficient ground to avoid the discharge. Whether the reason of the rule, as stated by Lord *Coke*, be thought satisfactory or not, it is enough that it has been established and recognized for cen-

[* 318]

ALBANY,
August, 1808.

COOPER
v.
HEERMANCE.

turies. This point was not decided in the case of *Service v Heermance*, as there were other reasons for setting aside the replication.

SPENCER, J., delivered the opinion of the court. It has been repeatedly decided in this court, as well as in the *English* courts, that distinct matters cannot be put in issue by a replication, unless they are necessary to constitute one point. In such case, the facts must have a relation to each other, and be so dependent, and connected, as to render it necessary to state them all, in order to make out the point. This rule is well exemplified in the case of *Strong & Udall v. Smith*, (3 *Caines*, 162.)

The statute enumerates several acts of fraud, either of which will invalidate the discharge. Among these, the fraudulent concealment of creditors, the procuring any person to become a petitioning creditor for a larger sum than is really and *bona fide* due, the commission of perjury, by concealing any part of his estate or effects, are particularly specified; and as either of them would avoid the discharge, they cannot, in any view, be considered as dependent or connected facts. The replication, therefore, violates an established rule of pleading, which requires a traverse to be of a single point.

It was suggested, that the decision of the court in the case of *Service v. Heermance*, seemed to sanction this mode of replying; but there is nothing in that case to warrant the observation.

We are, therefore, of opinion, that the replication is bad; but as the plaintiff has asked leave to amend, on payment of costs, leave is granted for that purpose.

THOMPSON, J., not having heard the argument in the cause gave no opinion.

Judgment for the demurrant.

*M' KINSTRY *against* PEARSALL.

THIS was an action of *assumpsit*. The declaration contained a count for 50 barrels of beef sold* and delivered, a count for goods sold generally, and the general money count. Plea, *non assumpsit*.

The cause was tried at the *Columbia* circuit, in *October*, 1807.

The plaintiff gave in evidence a paper, signed by the defendant, in the words and figures following:—

“Received of Captain *E. Smith*, 50 barrels of provisions, for account of *David M'Kinstry*.

‘*Robert Pearsall*.

“5th *December*, 1803.”

The defendant then proved by his clerk, that in *November*, 1803, the plaintiff called to settle a debt which he owed to the defendant, as one of the executors of *S. Bowne*; and the plaintiff, upon that occasion, told the defendant, that he had provisions, which he would leave with the defendant to sell, but wished him to keep them for a higher market, and thereupon the provisions mentioned in the receipt were sent to the defendant.

The witness further testified, that *Pearsall* never received provisions, except to sell on commission; that this was his uniform custom; that the provisions in question were sold in *July* following at a credit of 60 days, to *Allison & Giger*, who were then in good credit; that their note for these and other provisions, amounting to 530 dollars, endorsed by the defendant, was discounted at the bank; that the purchasers failed before the note fell due; that *M'Kinstry* was informed of this in the autumn of 1804; and that the provisions had made a bad debt. The note was protested for non-payment, and was taken up by the defendant.

The sale of the provisions, and the taking the note, &c., were in the usual course of mercantile business; in cases of this kind.

*On the 16th *April*, 1805, *M'Kinstry* wrote to *Pearsall* as follows: “You will be so obliging as to inform me what my provisions, left in your hands last autumn, sold for, in order that I may make some arrangements to settle my accounts. I have satisfied Messrs. *Hosmer & Rodman*, respecting the demands the estate of *S. Bowne* had against me.”

All the evidence offered by the defendant, was objected to, and the judge thought it improper, but allowed it to be given, *se bene esse*.

The judge charged the jury, that upon the declaration and

ALBANY,
August, 1808.

M'KINSTRY
v.

PEARSALL.

P. gave the following receipt to the master of a vessel for goods: “Received of Capt. *E. Smith*, 50 barrels of provisions, on account of *David C. M'Kinstry*, 5th *December* 1803.” In an action brought by *M'Kinstry* against P., for goods sold and delivered, it was held, that the receipt was not evidence of a sale of the provisions; nor that they were received on account, due from *M'Kinstry*; but rather to sell on commission, in the usual course of business; and that parol evidence was admissible to show that the provisions were in fact received, to sell on commission, and so far to explain the written receipt.

[* 320]

ALBANY,
August, 1808.

M'KINSTRY
v.
PEARBALL.

evidence, the plaintiff was entitled to recover, and the jury found a verdict for the plaintiff, accordingly.

A motion was now made to set aside the verdict.

1. Because it was against evidence.
2. For the misdirection of the judge.

• Hopkins, for the defendant.

E. Williams, contra.

SPENCER, J., delivered the opinion of the court. If the receipt had been in terms more explicit than it is, it would be open to explanation; I mean that kind of explanation not directly contradictory to, but consistent with it. (*Peack's Ev.* 117, 118. 8 *Term Rep.* 379.) With respect to papers of this kind, the courts have permitted the party to show mistake, fraud, and imposition, in obtaining them. It is not necessary, in this case, to go so far, as the receipt itself is perfectly equivocal; and from the mere reading of it, no one could say whether the provisions were received to go on an account held by the defendant against the plaintiff, or whether the defendant meant only to acknowledge that though the provisions were received from Captain *Smith*, they were received by the defendant for safe keeping, *for or on account of David M'Kinstry*. I should understand the receipt to import the latter, for several reasons; because there is no sum mentioned at which they were received, and because, *for account* denotes, with more propriety, the ownership of the property, rather than that they were received on an account against him.

[* 321]

*Being clearly of opinion, that the evidence offered, did not contradict the receipt, and that it was admissible, I think that the defendant has fully exonerated himself from any liability, by showing, that he received the provisions to sell, as a commission merchant; that they were sold on credit, and to a house of credit; and that, by the failure of that house before the note fell due, he has recovered nothing from them; and that this was in the usual course of mercantile business.

We are, therefore, of opinion, that the defendant is entitled to a new trial, with costs to abide the event of the suit.

THOMPSON, J., not having heard the argument of the cause gave no opinion.

New trial granted

GRISWOLD and GRISWOLD *against* THE NEW-YORK
INSURANCE COMPANY.

ALBANY,
August, 1808.

GRISWOLD

v.
NEW-YORK
INS. COMPANY.

THIS was an action on a policy of insurance, on the *freight* of the ship *Culloden*, valued at 3,300 dollars, on a voyage "at and from *New-York* to *Barcelona*, with liberty to touch at *Gibraltar*."

The cause had been once tried, when the jury found a verdict for the plaintiff, and, on a motion for a new trial, *the verdict was set aside, and a new trial granted. (*See vol. 1. p. 205.*)

On the *second* trial, at the sittings held in the city of *New-York*, in *June*, 1807, before Mr. Chief Justice *Kent*, the jury found a *special verdict*; on which the cause was argued at the last term by

Wells and *Radcliff*, for the plaintiffs, and

Hoffman and *Harison*, for the defendants.

The material facts found by the special verdict, and not stated in the former case, were,

1. In consequence of the vessel's stranding, the whole of the cargo, which consisted of 2,300 barrels of flour, was damaged by the sea-water, except between 100 and 200 barrels on the upper tier. The whole of the flour so damaged was so much wet and spoiled as to be totally unfit to be reshipped for that, or any other voyage; and if it had been reshipped and carried to its port of destination, it would have been worth nothing, on its arrival there; that if the part which was not wet and damaged, had been reshipped with the rest of the cargo in its damaged state, it would have become heated, and more or less spoiled; and that no prudent person would have taken the cargo as a gift, subject to the expense of the freight to *Barcelona*.

2. That on the 3d *March*, 1804, being the day on which the vessel grounded, in going out of the harbor of *New-York*, the plaintiffs sent a written notice of the accident to the defendants, to which the president of the company replied, "Very well; I have sent for Captain *Kermil*." A similar notice of the situation of the vessel was given by the plaintiffs on *Sun-*

Insurance on freight from *New-York* to *Barcelona*. The vessel, in going out of the harbor, and while

[* 322] proceeding on the voyage insured, was stranded, in consequence of which, the cargo, consisting of flour, was so much damaged, that had it been carried to its place of destination, it would not have been worth the freight. Information of the accident was given to the insurers, on the day it happened, and two days after, the insured abandoned as for a total loss. The vessel was repaired, and in a capacity to prosecute the voyage in seventeen days, and at an expense of about 150 dollars. The cargo, which was insured by others, had also been abandoned, and was accepted by the underwriters, and sold at auction, at a loss of about 27 per cent. It

was held, that the insured on the policy on freight had no right to abandon, but ought to have offered to the owners of the cargo to carry it to its place of destination, so as to entitle themselves to the freight. (a) The acts of the agent of the insurer, in saving of the cargo, and being present at the unloading and delivery, will not amount to an acceptance of the abandonment, or justify the inference that the insurer consented to the breaking up of the voyage.

Where goods are carried to the place of destination, though spoiled so as to be of no value, the owner cannot abandon the goods for the freight, but the master is entitled to his full freight for the transportation of the goods. (b)

(a) *Saltus v. The Ocean Insurance Company*, 14 Johns. 138.

(b) *Herbert v. Hallett*, 3 Johns. Ca. 93. *Saltus v. The Ocean Ins. Company*, 14 Johns. 138. 18 Johns. 210.

ALBANY,
August, 1808.
GRISWOLD
V.
NEW-YORK
INS. COMPANY.

[* 323]

day, the 4th *March*, and an abandonment made on the 5th, which was repeated on the 7th of the same month.

In their letter of the 5th, the plaintiffs say, "If you are of opinion that the cargo is bound to pay any freight, it will be for your interest to give directions that the cargo be not delivered to the shippers or underwriters on the cargo, until the freight may be settled. The *a* is a sloop, *with some flour on board, taken from the ship, it is necessary that some orders should be given for discharging the flour."

On the 10th *March*, the defendants informed the plaintiffs, that their taking charge of the ship should not prejudice any claim they had on the defendants for freight.

3. That in consequence of the disaster, the voyage was broken up, and its further prosecution relinquished.

4. That before and after the abandonment, the agent of the defendants, who was one of the directors of the company, and an agent of *The Commercial Insurance Company*, by whom the cargo had been insured, were on board, and superintended and directed the unloading of the ship, and employed persons for that purpose.

5. The vessel, after being repaired, did not proceed on her voyage, but was sold by the plaintiffs some time after the 10th *March*, 1805, for their own benefit.

6. That it is the uniform practice, in the city of *New-York*, where flour shipped for exportation is damaged and relanded, that it is always sold, without delay, to the consumers, and is never reshipped.

7. That after the accident, the mate of the ship applied to the plaintiffs for their directions, who informed him, that he must take his orders from Captain *Kermit*, (the agent of the defendants,) and the mate accordingly acted under the directions of *Kermit*, and assisted in delivering the cargo to the *Commercial Insurance Company*.

8. The ship was repaired, and ready to take in a cargo in seventeen days after the accident, at an expense of about 150 dollars.

9. That, previous to the delivery of any part of the cargo from the ship at *New-York*, the plaintiffs, or one of them, in a conversation with one of the directors of the *Commercial Insurance Company*, and acting in their behalf in relation to the cargo, consented that the cargo should be received by the said company; that there was no communication between the defendants and the *Commercial Insurance Company*; but *Kermit*, who was the agent of the *defendants, knew that all the cargo was delivering to the *Commercial Insurance Company*, and made no objection.

[* 324]

10. That it is usual for the different *Insurance Companies* to employ persons, who are called inspectors, to examine and report the condition of vessels; and in case of damage or accident to any property insured, to give directions and to aid

and assist in its preservation; and that *Kermit* acted in this character for the defendants; and one *Whitlock* for the *Commercial Insurance Company*; but they had no power to bind the company to accept an abandonment.

11. That about 900 barrels of the flour were taken out at *Long Island*, and the residue at *New-York*; and one of the plaintiffs was frequently at the ship while unloading at *New-York*.

ALBANY,
August, 1868.
GRISWOLD.
V.
NEW-YORK
INS. COMPANY

For the plaintiffs, it was contended, that it was a settled principle of the law of insurance, that whenever a voyage is broken up, or defeated by any of the perils insured against, the insured has a right to abandon; that by the facts in the present case, it was manifest that the voyage was wholly defeated; for if the cargo had been reshipped, and sent to its port of destination, it would inevitably have been so much deteriorated, as not to be worth the freight. It was found to be the invariable usage never to reship damaged flour. There was then such a destruction of the cargo, as wholly to defeat the object of the voyage. It would be unreasonable to oblige the insured to send on a cargo in a perishable state, and which would certainly be worth nothing at the port of delivery. That the vessel was repaired and ready to carry freight, could make no difference, if there was no cargo to be carried. There must be a cargo as well as a ship, for freight is the joint result of both. If the cargo had, from necessity, been thrown overboard at sea, and lost, no freight would have been earned, and the defendants would have been liable. There was, then, no difference whether the goods were absolutely and totally lost by the perils of the sea, or so much damaged as to be worth nothing at the port of destination. *If the owner of the goods had a right to abandon them to the insurer, the plaintiffs had a right also to abandon the freight. Every commercial enterprise is made with a view to gain, at the port of destination. That is the object the owner intends to insure. Now when there is a moral certainty, and it is found as a fact, that the goods would be of no value at the destined port, why compel the insured to carry them, or to do a useless and nugatory act? An offer to carry on the cargo, under the circumstances of the case, would have been an idle ceremony, nor were the plaintiffs bound to make such offer. But if they were, the offer was, in effect, waived by the acts of the defendants. Though cautioned as to the delivery of the cargo, until the freight was secured, the defendants acquiesced in its delivery to the *Commercial Insurance Company*. The plaintiffs had a right to assist in saving the vessel and cargo, without prejudice to their claim on the defendants; indeed, it was a part of their duty, and cannot be construed a waiver of the abandonment.

Again, if the flour had arrived at *Barcelona*, the owners might have abandoned it for the freight. The rule was so laid

ALBANY,
August, 1868.
GRISWOLD
V.
NEW-YORK
INS. COMPANY.

down by Lord *Mansfield* in the case of *Luke v. Lyde*, (2 Burr 886.) It was admitted to be the rule, by the counsel in a prior case, *Lutwidge v. Grey*, (*Abbott*, 234. 239.) and has been recognized in the subsequent case of *Baillie v. Moudigliani*, (*Park*, 53.)

Valin, in his commentary on the marine ordinance of *France*, maintains the justness of this rule.

In the case of *Frith v. Barker*, (2 Johns. 327.) this court decided, that where sugar had been washed out of the hogsheads, which had fallen to pieces, no freight was due. There is, in reason, no difference between that and the present case where the flour, if it had arrived at *Barcelona*, would have been worth nothing. The rule is not only just, but it is founded in good policy, as the master is thereby interested to take better care of the goods, when he knows that his freight is made to depend on their arriving in good order. On a similar principle of policy, seamen's wages are made to depend on the earning of freight.

[* 326]

*For the defendants, it was argued, that there was no substantial difference between the special verdict and the case formerly before the court; and that if there was any difference, it was in favor of the defendants, for it was found that the plaintiffs did assent to the delivery of the cargo to the *Commercial Insurance Company*. Part of the cargo was delivered at *Long Island*, and before the letter of abandonment on the 7th March. By delivering a part, the *lien* of the defendants, in case of an abandonment, was impaired. *Kermit's* authority extended no further than to take care of the property; he could not bind the defendants. Indeed, as a corporation, they cannot be bound, unless by an express authority. Notwithstanding the usage as to selling damaged flour, still the plaintiffs might have insisted that the freight should be first paid out of the sales.

But the material question was, whether, admitting the cargo to have arrived at *Barcelona*, in its damaged state, the owner could have abandoned it for the freight.

The case of *Luke v. Lyde* amounts to no more, than that such an abandonment of the goods may be made at an intermediate port, into which the vessel has been forced by necessity. The precise question now before the court has never been decided in *England*.

This is evident from the observations of Mr. *Abbott*, who has stated the different cases and the opinions of foreign jurists; and it is obvious, that his opinion is against the rule contended for on the other side.

The opinion of *Pothier*, which is contrary to that of *Valin*, is far more rational and just, and is founded on the nature of the contract between the master and the merchant. When the master has carried the goods to the destined port, he has per-

formed his undertaking, and is entitled to the stipulated reward for the service. He has nothing to do with the soundness or value of the goods. Nothing will prevent a ship from earning freight, but an incapacity to prosecute the voyage, or the absolute loss of the cargo, by the perils of the sea.

*Again, the insurer has no concern with the *manner* in which the freight is paid; and if it is admitted, that the owner of the cargo might have abandoned it at *Barcelona* for the freight, then it would follow, that the goods would be substituted as a payment of the *freight*, and so the plaintiffs would have no right of action against the defendants for a loss of freight.

KENT, Ch. J., delivered the opinion of the court. The only material difference between the special verdict before us, and *the case*, which was made upon the former trial of this cause, is respecting the extent of the damage to the flour. It is now found that all the flour, except between 100 and 200 barrels, became damaged, and wholly unfit to be reshipped, for that or any other voyage, and that if the damaged flour had been carried to *Barcelona*, it would have been worth nothing there, and would have injured the sound flour, and that no prudent person would have taken the cargo as a gift, and carried it, subject to the expense of the freight. But it is also found, that the whole cargo was sold at *New-York*, at a loss of only 25 or 27 per cent., which was, of course, more than double the amount of the freight.

These facts do not appear to vary in any degree the application of the principles laid down by the court in the former consideration of this cause. When the plaintiffs abandoned, on the 5th of *March*, they had a cargo in charge worth more than double their freight. The ship was in a condition to be immediately and easily repaired, and in 17 days she was repaired, and ready for sea. If the plaintiffs, instead of abandoning to the defendants, had offered to proceed with the cargo, and the owners of it had refused, they would have made themselves liable for the full freight. If the owners had consented, the plaintiffs would have been bound to proceed, and run the risk (against which risk the defendants had assured by the policy) of losing the freight by the loss of the cargo, in the course of the voyage, or of earning freight by its **safe* arrival and delivery at the port of destination. How does it appear that freight could not have been earned? For the plaintiffs to abandon without assuming this risk, was unreasonable and inadmissible. It would, no doubt, have suited very well with their convenience to have received the full freight for the voyage, without ever leaving the port of *New-York*, and to have employed the time which that voyage would have consumed, in earning freight on some other. But they cannot be permitted to enjoy this good fortune, unless they can show clearly that the freight insured was

ALBANY,
August, 1808
GRISWOLD
V.
NEW-YORK
INS. COMPANY.
[* 327]

[* 328]

ALBANY,
August, 1808.
GRISWOLD
V.
NEW-YORK
INS. COMPANY

lost, either by the act of the shipper, or by the perils of the sea. Whether it would have been wise or foolish in the shipper, to have sent on the flour, in the condition it was in, was a question not to be put by the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do, by their contract, was to provide the means to take on the cargo, by repairing their ship, or procuring another.

But it is said, that the cargo, if carried on to *Barcelona*, would not have been worth the freight. This is the import of the special verdict. Here, then, the question arises, whether the plaintiffs would not have had their remedy against the shipper, personally, for any deficiency in the freight, or whether the owners could discharge themselves completely, by abandoning the damaged cargo to the plaintiffs, after its arrival at *Barcelona*.

This question has not, hitherto, received any judicial decision in the *English* courts; and it has been frequently mentioned in this court as a point unsettled. We are, therefore, called to examine the question upon principle, and upon the authority of the marine law of foreign states.

The contract of affreightment, like other contracts of letting to hire, binds the shipper personally, and the *lien* which the ship-owner has on the goods conveyed, is only an additional security for the freight. This *lien* is not *incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration for the freight, is the carriage of the article shipped on board, and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment, is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common law doctrine of carrying for hire, we cannot discover any principle which makes the carrier, an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his *lien* afforded, but it cannot affect his personal demand against the shipper. This conclusion appears to be so natural and just, that I cannot perceive any plausible ground upon which it has been questioned or denied. The weight of authority is certainly on this side. The *French* ordinance of the marine (*tit. du Fret*, art. 25.) is explicit to

[* 329]

the point. This code is not only very high evidence of what was then the general usage of trade, but from its comprehensive plan, and masterly execution, it has long been respected as a digest of the maritime law of all the commercial nations of *Europe*. *Valin*, in his commentary upon this ordinance, calls in question the equity of the rule; but his reasoning, when we apply it to the true construction of the contract, is weak and superficial; and it has been exposed and answered, and the solidity of the rule vindicated, by a superior and more luminous jurist. (*Valin*, tom. 1. 670. *Pothier*, *Charte-Partie*, No. 59.)

*But though this question has never been settled at *Westminster Hall*, Mr. *Abbott* (p. 243.) says, that the assumed right to abandon deteriorated goods, at the port of discharge, is not, in point of practice, claimed in that country, and his opinion is evidently in favor of the rule, as established in *France*. We have, however, the opinion of Lord *Mansfield* against it, according to the report of the case of *Luke v. Lyde*; and if we were certain of the accuracy of that part of the report, and that the observation was intended to apply to the very question before us, we ought to pause even over the *dicta* of so preëminent a judge. We cannot, however, bend our convictions to a mere extrajudicial saying, and when this cause was formerly before us, the weight of this *dictum* was greatly diminished by the judicious reflections of one of the Judges of this court,† who has since been elevated to the bench of the *United States*.

The acquiescence of the defendants in the breaking up of the voyage, and the abandonment of the freight, have been urged to the court as facts, better supported by the special verdict, than they were by the case made. There does not, however, appear any material alteration of the cause in this respect, and there is nothing which gives sufficient color for such an inference. The acts of *Kermit*, the agent of the defendants, relative to the delivery of the cargo to the *Commercial Insurance Company*, went no further than was requisite to the unloading and repairing of the ship, of which the defendants were also the insurers. Every act is referable to that object. The assent of the defendants ought to have been found as a positive, substantive fact, if it ever existed. It would be unjust to infer it from acts capable of a different explanation, and which, at most, were but equivocal.

The court are, accordingly, of opinion, that judgment must be rendered for the defendants.

ALBANY,
August, 1808.
GRISWOLD
V.
NEW-YORK
INS. COMPANY

[* 330]

† Mr. Justice
Linneston

Judgment for the defendants.

ALBANY,
August, 1808.

JACKSON
v.
HASBROUCK.

*JACKSON, *ex dem.* OSTRANDER and OSTRANDER,
against HASBROUCK.

Where the proprietors of a tract of land made partition of it, in 1747, agreeably to a survey thereof made for that purpose by their request, and released to each other, by deed, their respective shares, according to the map and survey, and possession afterwards was taken and held agreeably to such survey, for above 20 years, it was held, that persons holding under the proprietors were concluded by such survey and partition, although it should appear, by a subsequent survey in 1801, that there was a mistake in the first survey, on which such partition was founded; unless it should be proved that the

[* 332]

proprietors had, afterwards, agreed to correct the mistake, and alter the boundary lines. The partition deed operates as an estoppel, as to the parties, and all persons claiming under them.

THIS was an action of *ejectment*, for the lands in the town of *Plattekill*, in the county of *Ulster*. The cause was tried before Mr. Justice *Spencer*, at the *Ulster* circuit, in *September*, 1807.

The lessors of the plaintiff deduced a regular title from the year 1752, to the north part of the lot No. 1, in the patent, known by the name of *Bradley & Jevou's* patent. The lands in the patent, as appeared by the partition deeds, were divided in 1747, by the then proprietors, on an actual survey made at their request, by *John Eltinge*, a surveyor. *Abraham Hasbrouck*, the father of the defendant, and under whom the defendant claims, was a proprietor at the time, and had released, according to the said survey and partition, all his right to lot No. 1, in the north bounds of the patent to *Van Horne*, under whom the lessors claimed. This release, a record of which was read in evidence, recited the agreement of the proprietors to make a partition, according to the survey of *Eltinge*, and after reciting the partition and survey, it referred to the map or chart of survey made by *Eltinge*, and particularly described the bounds of the lot, and the courses and distances, beginning at the north-east corner of lands granted to *William Huddlestone*. The plaintiff then produced evidence which established the north-east corner of *Huddlestone's* patent; and also a map and survey of lot No. 1, made by *Charles Clinton*, surveyor, according to the courses and distances given in the survey of *Eltinge*, by which the boundaries were different from that survey, and the premises in dispute, arising on these two surveys, were distinguished on a map, and submitted to the inspection of the court.

*The defendant derived his title from *Abraham Hasbrouck*, to lands granted to *Bradley* and *Jamieson*, subsequent to the grant to *Bradley* and *Jevou*, and insisted that the premises were within the patent to *Bradley* and *Jamieson*, adjoining the north bounds of lot No. 1, and the north bounds of the patent to *Bradley* and *Jevou*, and that the adverse possession of the defendant barred the plaintiff's right of recovery. In order to show that the premises did not lie in the patent to *Bradley* and *Jevou*, the defendant produced a survey made by *Johannes Bruyn*, in 1801. *Bruyn* and *Clinton*, the surveyors, were both examined as witnesses; but their testimony could not be understood, without a reference to the maps, and, in regard to the point decided by the court, it is unnecessary to state the evidence further.

The judge, in his charge to the jury, observed, that they were not to inquire into any mistake that might have been

made by *Eltinge*, in his survey and partition, or as to the bounds of the patent to *Bradley* and *Jevou*; that the parties to the partition deed, and all persons claiming under them, were concluded by the deed, and that the bounds of lot No. 1, as described in that deed, were to be taken as the true bounds thereof, unless altered by some subsequent act of the parties claiming under the partition deed; that the witnesses did not prove that there had been any line settled between the parties interested, subsequent to the survey of *Eltinge*; that the evidence respecting *Scutt's* line, and the old marked trees, was sufficient to establish *that* line as the northern boundary of lot No. 1, and that the lessors were entitled to recover to that line, and to *Scutt's* possession, which appeared to be according to the partition deed.

ALBANY.
August, 1808
JACKSON
V.
HASBROUCK.

The jury, accordingly, found a verdict for the plaintiff.

A motion was made, in behalf of the defendant, to set aside the verdict, as against evidence, and because of the misdirection of the judge.

Fisk, for the plaintiff.

E. Williams, for the defendant.

*YATES, J., delivered the opinion of the court. In this cause, the lessors of the plaintiff deduced a title under a deed given to *Van Horne*, in virtue of a partition of a tract of land comprehended in a patent granted to *Bradley* and *Jevou*, made in the year 1747, by the then proprietors, of whom *Abraham Hasbrouck*, the father of the defendant, and under whom he claims, was one, who, by that partition deed, released, according to a survey then made at the instance of the proprietors, by one *John Eltinge*, and on which the partition was founded, all his right in lot No. 1, in that patent.

[*333]

The defendant derived his title to the premises from *Abraham Hasbrouck*, as lying within the boundaries of an adjoining patent, granted to *Bradley* and *Jamieson*, subsequent to the patent of *Bradley* and *Jevou*, and claimed the premises on the ground of a mistake made in the original survey of *John Eltinge*. Thus, it appears, that the lessors of the plaintiff and the defendant both claim under separate persons, parties to this partition deed.

The first inquiry, therefore, will be, whether it was competent for the legal representatives of *Abraham Hasbrouck* to controvert the northern line of lot No. 1, in the survey by *Eltinge* of the patent to *Bradley* and *Jevou*, by setting up a title under the patent to *Bradley* and *Jamieson*.

By the release of partition between the proprietors, it will appear, from the recital, that they agreed to make a division agreeably to the survey of *Eltinge*. This being a deed, under their hands and seals, must, as between the parties to this in-

ALBANY,
August, 1808.

JACKSON
v.
HASBROUCK

[* 334]

strument, be a complete establishment of the line run by that survey, so that the inquiry for the jury, under those circumstances, on the trial of this cause, could only be, whether *Eltinge*, by his survey, comprehended the premises in question, within the boundaries of lot No. 1. This survey was, by the judge *before whom the cause was tried, properly considered as operating as an *estoppel* against the defendant, and concluded him from controverting the northern line of lot No. 1, on the ground of a mistake in that survey, alleged to have been discovered by the other survey, made in 1801. Admitting even, that a mistake was made by *Eltinge*, in his survey, yet as the proprietors, by the deed, have recognized the lines run by him, and made partition accordingly, and as the defendant claims under one of them, he cannot now gainsay an act thus deliberately assented to, and subscribed by him; nor can this mistake be rectified, unless done by a subsequent agreement of the parties.

The propriety of the rule of law, whereby parties or privies are not allowed to controvert facts admitted by their solemn deed, appears in this case. The mistake was made in the survey of another lot, containing ten chains too much; so that the loss occasioned by this mistake would exclusively fall on the proprietors of lot No. 1, and thus create an inequality in the partition.

An attempt was made to prove an agreement as to the northern line of this lot, but, instead of an abandonment of the possession of the lands lying between the lines of *Bruyn* and *Eltinge*, the witness said that he considered the land to be his, up to a fence, standing on a line called *Scutt's* line, confessedly south of *Eltinge's* line, and as far north as the lessors of the plaintiff recovered on the trial; that he never gave it up, but meant some day to try the title to it, notwithstanding the removal of the fence by *Abraham Hasbrouck*; and that one year subsequent to such removal, he took the avails of the land; so that, in fact, no evidence was introduced of an alteration by agreement, in relation to the lines of No. 1, or the northern line of the patent, as run by *Eltinge*. This line was recognized as the true boundary, by the partition deed between the proprietors, has been so generally received, and possession of the premises in question held for upwards of twenty years under it, and ought not now to be disturbed. *The case of *Skipwith v. Green* (1 Str. 610.) does not support the principle contended for by the defendant's counsel, but establishes, that with respect to every essential part of the deed, the parties claiming under it are estopped from controverting it.

[* 335]

The court are of opinion, that the defendant must take nothing by his motion.

THOMPSON, J., not having heard the argument in the cause, gave no opinion

Rule refused.

WATSON *against* DUYKINCK.ALBANY.
Augst, 1808WATSON
v.
DUYKINCK.

THIS cause came before the court, on a writ of error, from the Court of Common Pleas of the city and county of *New-York*. The suit below was an action of *assumpsit* for money had and received to the use of the plaintiff, and a special verdict was found, upon which the court gave judgment in favor of the plaintiff for 60 dollars, on which the defendant below brought a writ of error to this court. The substance of the special verdict was as follows: The defendant below, (*Watson*), on the 17th *December*, 1805, was master of the sloop *Harriot*, bound on a voyage from *New-York* to the island of *St. Thomas*. *Watson* agreed with the plaintiff below (*Duykinck*) that, "in consideration of 100 dollars to be paid immediately, he would suffer the plaintiff to proceed in the sloop, as a passenger, on the voyage, and to load on board, for transportation, merchandise to the value of 600 dollars, and that the defendant would provide meat, drink, &c. for the plaintiff, during the voyage." The plaintiff agreed to pay that sum, and accordingly paid it on the same day to the defendant. On the 23d *December*, 1805, the plaintiff embarked, as a passenger, and the defendant procured sufficient necessaries, &c., and the plaintiff put goods on board, to the value of 600 dollars. The sloop sailed on the same day, on the voyage, and was seaworthy. She sprung a leak, two days after leaving the port of *New-York*, and was obliged to bear away for *New-London*. On her way there, she was unavoidably wrecked on *Norwalk Island*, and lost; the master and crew returned, in 10 days thereafter, to *New-York*. The chief part of the cargo was saved and brought to *New-York*, and the goods of the plaintiff were delivered to him. The plaintiff assisted equally with the crew in endeavoring to save the vessel and cargo. The expense of saving the cargo, and bringing it to *New-York*, was paid by the defendant. The average charge on the plaintiff's goods, towards the expenses of salvage, was 20 dollars. The defendant provided no other vessel, but the plaintiff went to *St. Thomas* in another vessel. The usual price for a passage to *St. Thomas*, for a passenger, is 80 dollars, and 50 dollars, if he finds himself. By the usage and custom of *New-York*, passage money is paid, at the time the passage is taken, and is never refunded if the voyage has begun, though a subsequent accident should prevent its completion. But whether the plaintiff is entitled to recover back the 100 dollars paid by him, or the same after deducting the salvage aforesaid, or whether the defendant is entitled to have

Where freight is paid in advance, on a contract for the transportation of goods, and the vessel is shipwrecked, so that the voyage is broken up, the master or owner is bound to refund the freight paid in advance, unless there is a special agreement to the contrary. Where A., "in consideration of 100

[* 336] dollars, to be paid immediately, agreed that he would suffer B. to proceed and go in A.'s vessel, as a passenger, from *New-York*, to *St. Thomas*, and to load on board for transportation, goods to the value of 600 dollars," and B. paid the 100 dollars down, and went on board with his goods, but the vessel, soon after the commencement of the voyage, was shipwrecked, and lost, but the goods were saved, and delivered to B. and B. brought an action for money had and received, &c. to recover back the 100 dollars, it was held that this was an agreement to receive B. and his goods on board, and not

an agreement to transport and deliver them at *St. Thomas*, and that the plaintiff, therefore, was not entitled to recover back the money advanced for the freight and passage. The consideration in this case for the payment of the money, is the receiving of B. and his goods on board, and not the transportation or delivery of them.

ALBANY,
August, 1803

WATSON
V.
DUYKINCK

the 20 dollars certified in his favor, the jurors are ignorant, &c.

The following points were made and insisted on by the counsel for the plaintiff in error:—

1. That the passage money cannot by law be recovered back, under the circumstances of the case.

2. That the custom found by the jury is conclusive against such recovery.

[* 337]

*3. That, even if the plaintiff was entitled to recover back his passage money, it could not be in this form of action.

S. Jones, jun. for the plaintiff in error. 1. In ordinary cases, it is true, that freight or passage money cannot be recovered, until the service is performed, or until the goods or persons are transported, but it is most generally stipulated, that the freight is to be paid on the delivery of the goods at the place of destination, so that the delivery of the goods, or the performance of the service, is made a condition precedent. But where, as in the present case, the freight or passage money is first paid, the performance of the service is a matter subsequent; and where, in such a case, the failure to perform is not owing to any act or negligence of the party stipulating to perform, he is not bound to refund the money. The moment the plaintiff and his goods were on board, and the voyage had commenced, the right of the defendant to the money he had received was perfect and indefeasible. As in a case of insurance, as soon as the risk has commenced, by the inception of the voyage, though the voyage is never performed, the insurer may retain the premium which he has received. Where money is paid down for goods to be transported, it is not properly denominated freight, which is for the actual carriage of goods, but it is a payment of money for the lading or permitting the goods to be received on board for the purpose of being carried. (*Abbott*, 225.)

In the case of *Blakey v. Dixon*, (2 Bos. & Pul. 321.) it was said by Mr. Justice *Chambre*, that the receiving of goods on board, to be carried to a foreign port, was a good consideration on which to found a promise to pay the freight immediately; and it was held, in that case, that an action would lie for the money agreed to be paid, though the goods had not been transported.

[* 338]

2. But if any doubts existed as to the law, the usage found by the special verdict, in this case, ought to be conclusive. Usage, in all commercial cases, will be received in evidence, and when clearly proved, will always govern. There is this reason, also, for the usage, that the master is obliged to expend money, in order to provide provisions and stores for the passengers during the voyage.

3. If the plaintiff is entitled to recover his money back, it is not to be recovered in the present form of action. There is no failure of consideration to furnish a ground for this action.

Here the contract is entire, and the whole must be recovered, or none. The plaintiff must show that the consideration has *wholly* failed, but the plaintiff and his goods were received on board, and a part of the voyage performed. Besides, in an action to recover back money paid on a good consideration, the plaintiff will be held to stricter proof than he would be, if defending himself against the payment of it. If there was an express contract to carry the plaintiff, the proper remedy would have been an action for damages, for the non-performance of the contract.

ALBANY,
August, 1808.

WATSON
V.
DUYKINCK

J. S. Smith, contra. 1. The question as to the form of the action was not raised or considered in the court below. But since the case of *Moses v. Macfarlane*, (2 Burr. 1005.) there can be no doubt but that an action for money had and received to the use of the plaintiff will lie. There has been a failure of consideration, and the defendant ought in justice and equity to refund the money.

2. There was a positive agreement, that for the sum of 100 dollars, the defendant would carry the plaintiff and his goods to *St. Thomas*. *Passage money* and *freight* are the same thing, and where there is an agreement to *transport* goods or persons for a certain sum of money, no freight is due, unless they are transported, or the contract performed. (*Abbott*, 225.) Although the general rule is, that the contract for the carriage of goods is an entire contract, yet the exceptions to it, as to a *pro rata freight*, are as well settled as the rule itself. The cases on this head are numerous, and may be found in *Abbott*, (249. 253. 262.)

*3. There cannot be, in this country, any custom or usage so long established, as to have the force of law, and be binding on the parties. At best, it is no more than the local usage of the city of *New-York*; and local usages of particular places form no part of the general *law-merchant*, which is to govern the decision of commercial questions.

[* 339]

KENT, Ch. J., delivered the opinion of the court. The record in this case presents a question of some nicety and difficulty, arising under the marine law. The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master, in case of shipwreck, to restore to the shipper the freight previously advanced. The *English* books are almost silent on the subject, and afford little or no information; but if we resort in this, as we are obliged to do in many other instances, for light and information, to foreign compilations, and distinguished writers on maritime jurisprudence, we shall find the point before us to have been considered and decided.

Cleirac, in his commentary on the judgments of *Oleron*, art. 9. no. 9. (*les Us. et Coutumes de la Mer*, τ 42.) declares,

ALBANY,
August, 1808.

WATSON
V.
DUTKINCK.

[* 340]

that in cases of shipwreck, the master is bound to render to the merchants, the advances which they may have made upon the freight, and he cites a decision of one of the early jurists, in confirmation of his doctrine: *Naufragio facto exercitor naua restituit quæ ad manum perceperat, ut qui non trajecerit.* The ordinance of the marine (tit. *du Fret*, art. 18.) recognizes this ancient rule, and ordains, that if goods be lost by the perils of the sea, the master shall be holden to refund the freight which had been previously advanced to him, unless there be a special agreement to the contrary. This agreement, according to *Valin*, (*Comm. sur l'Ord. tom. 1. p. 661.*) always contains an express stipulation, that the money advanced shall be retained in any event which may happen in the course of the voyage. The policy of the general rule on this subject, was to take away the temptations to negligence or misconduct, which the certainty of freight was calculated *to produce in the master. I ought, perhaps, to observe, that there is a *dictum* of Mr. Chief Justice *Saunders*, stated in an anonymous case, in 2 *Show.* 291. which would seem to imply, that advance money for freight was, in no event, to be refunded; but I do not place reliance upon that very imperfect report, in opposition to the explicit opinions of the writers which have been mentioned. (a)

The general principle undoubtedly is, that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried, by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail.

The general rule being then well established, the present case turns upon this point, whether the agreement stated in the special verdict, be such as to take the case out of the operation of the rule. The parties agreed, that in consideration of 100 dollars, to be paid immediately, the one would suffer the other to proceed and go in the sloop, as a passenger on the voyage, and to load on board, for transportation, merchandise to the value of 600 dollars, and that he would also maintain him as a passenger, during the voyage. The other party assented and paid the money, and put the goods on board, and proceeded with them as a passenger, until the disaster took place. This agreement did not go the length required by the **French* law of stipulating that the money

(a) *Roccus* is also of opinion, that freight paid in advance must be refunded, if the ship is lost during the voyage, or is prevented, by any sinister accident, from arriving at her port of destination. "*Nautum seu vectura non debetur si locator navis propter amissionem navis, ve alium casum in eam contingentem iter non fecerit, imo si solum fuerit repetitur.*" *De nav. et nautico. not.* 80. This doctrine he derives from the digest, (lib. 19. c. 1. § 2. 1. 15. § 6. *Locat. conduct.*)

Straccha, (*de navi. 3. n. 24.*) with whom *Loccenius* (*de jur. marit. lib. 3. c. 6 § 1.*) and *Roccus* (*n. 81.*) coincide, is of opinion, that, according to this law, the master is entitled to freight, *pro rata itineris*, where he has not been in fault. This idea seems to be founded on a principle of the contract of *letting to hire*; but *Pothier*, (*Charte-Partie de n. 63.*) with better reason, thinks the rule of the *French* ordinance the most equitable, and that no freight is due in such a case

should at all events be retained, but it was still particularly confined to the permission to be received on board, as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and deliver at the place of destination. In the one case, the master places his compensation upon the actual carriage and delivery of the goods. The safe arrival of the subject is a condition precedent to the payment. In the other case, the consideration is rendered by receiving the goods on board, and making all due and *bona fide* efforts to carry and deliver them. I think this latter is, upon the whole, the better construction of the agreement before us, especially as the practice of retaining the advance freight, in all such cases, must have been known to the parties, from the usage which has been found by the jury, and as the distinction between an agreement to receive on board, and an agreement to transport and deliver, is not a new refinement, but can be traced back to the text of the civil law. The doctrine is recognized and adopted by various authors, that if the agreement be to pay freight for *the loading of the article on board*, the freight is due, though the article perish in the course of the voyage. This is the language of the civil law.

Gothofredus, in his notes on the *Digest*,* (14. 2. 10.) states the distinction in more clear and explicit terms: *Conduxisti vehenda mancipia: mancipium unum in navi mortuum est; quæritur, num vectura debeatur? Si de mancipiis vehendis inita conventio est, non debetur: si de mancipiis tantum navi imponendis debetur.* † *Lex Ricana de jactu.*

Molloy (b. 2. c. 4. § 8.) and *Abbott* (p. 225.) seem to have followed the same authorities, but without making any discrimination between the cases where the money was, and where it was not actually advanced beforehand. Perhaps, no such discrimination is to be made, though I think the case of the money actually advanced is the stronger case, as forming superior evidence of the intention of the parties *that the freight received should, in every event, belong to the master.

We conclude, upon the whole view of this case, that *Watson*, the plaintiff in error, was entitled to retain the freight money, and, consequently, that the judgment below ought to be reversed.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment reversed.

ALBANY,
August, 1808
WATSON
V.
DUYKINCK

ALBANY,
August, 1808.

ROBERTSON
v.
BETHUNE.

ROBERTSON *against* BETHUNE and BOORMAN.

R. the owner of a ship, entered into a written agreement with B. to carry certain goods in the vessel from New-York to Surinam, and to bring back 200 hogsheads of molasses from that place to New-York; and B. agreed to pay R. 2,600 dollars for the freight, but if accident should prevent the delivery of the

[* 343]

return cargo, then he was to pay only 1,300 dollars, and R. engaged that the vessel should lay 35 days at Surinam, to unload and reload. The vessel stayed the 35 days, and the return cargo not being ready, she waited 20 days longer, at the request of the agent and consignee of B., but who had no control over the vessel. B. paid the 2,600 dollars freight. In an action of *assumpsit* brought by R. against B. to recover a compensation for the detention of the vessel beyond the time stipulated, in the nature of demurrage, it was held, that as the written contract contained no stipulation to pay demurrage, and no implied *assumpsit* could arise from the act of the assignee of the goods, who was not authorized to bind B. to pay demurrage, the plaintiff was not entitled to recover.

THIS was an action of *assumpsit*. The declaration stated "that whereas, on the 29th of September, 1805, the plaintiff being owner of the brig *Ohio*, then lying in the port of New-York, it was agreed between him and the defendants, that the plaintiff should receive on board of the said brig, to be delivered to one William A. Carstairs, at Surinam, 100 casks of codfish, 20 barrels of pickled fish, 100 kegs and firkins, 200 hogshead shoos and headings; and also should receive on board of the said brig at Surinam, to be delivered to the defendants in New-York, 200 hogsheads of molasses, and that, 75 days after the delivery of the return cargo, the defendants would pay to the plaintiff 2,600 dollars therefor, provided, that if any accident should prevent the delivery of the return cargo, the defendants should pay to the plaintiff 1,300 dollars, for the freight of the outward cargo, 75 days after its delivery at Surinam should be ascertained; and *the plaintiff further agreed with the defendants to allow them 35 good working days at Surinam, for discharging the outward cargo, and loading the homeward cargo; and whereas the plaintiff, in pursuance of the said agreement, on the 19th day of October, 1805, received on board the said brig, the said outward cargo, and therewith proceeded to Surinam, where the said vessel arrived on the 20th of November, 1805, and remained until the 24th day of January, 1806, and whereas, on the 24th day of January, in consideration that the plaintiff, at the special instance and request of the defendants, had permitted the said brig to remain at Surinam, until the said 24th day of January, the said defendants undertook and promised the plaintiff to pay him so much money as he reasonably deserved to have for the demurrage of the said brig beyond the said 35 days, when thereunto, afterwards, requested; and the plaintiff averred that they reasonably ought to have, &c. Plea, *non assumpsit*.

The cause was tried before Mr. Justice Spencer, at the sittings, in the city of New-York, on the 9th of December, 1807. The written memorandum of the agreement between the parties was produced, and was, in substance, as stated in the declaration, with the following clause: "Should William A. Carstairs wish to ship more than 200 hogsheads of molasses, he is to have a preference to any other shipper, at the current rate of freight, excepting what I. A. Robertson may wish shipped on his own account."

The master testified, that he arrived at Surinam, on the 18th of November, 1805, and there delivered the outward cargo to William A. Carstairs, the agent of the defendants. The un-

loading was completed in five days after his arrival; and 20 days from the time of his arrival, would have been amply sufficient to have completed the *unloading and reloading of the vessel.

Carstairs shipped on board, at various times, on account of the plaintiff, 43 hogsheads of molasses, and which were marked when on board, on the 24th of *December*, 1805, by the clerk of *Carstairs*, with the letter *R*. The casks containing the molasses were made of materials belonging to the plaintiff, which formed a part of the outward cargo. The master, immediately after his arrival, delivered letters from the defendants to *Carstairs*, which contained a copy of the above-mentioned agreement, and instructions as to the procuring the return cargo. The master frequently urged *Carstairs* to be expeditious in sending the return cargo, stating the orders from the plaintiff to make despatch, the injury to the vessel from worms, and the high expenses at that place. *Carstairs* generally answered, that he would be as expeditious as possible, and once replied, "that the defendants were not going to pay 2,600 dollars, and not have their full cargo on board." On the 3d of *January*, 1806, the master protested against the detention, but *Carstairs* still detained the brig, until the 26th of *January*, 1806, for though the last parcel of the return cargo belonging to the defendants (the whole being 170 hogsheads) was on board on the 18th of *January*, the master and crew were busily employed in preparing for the voyage home, until the time of sailing. The master further testified, that the sole ground of the detention of the vessel, after the third day of *January*, 1806, was the delay of *Carstairs*, in procuring the return cargo for the defendants. *Carstairs* was the consignee of the plaintiff's share of the outward cargo, but had nothing to do with the vessel, though the master was instructed to call on him for the necessary supplies of money, without which he could not conveniently leave *Surinam*. The master had two offers of a return cargo at *Surinam* from other persons, which he would have accepted, had it not been for his situation in regard to the consignee of the defendants. The 200 hogsheads, in addition to the 43 hogsheads belonging to the plaintiff, would not have *made a full cargo for the vessel. The letter of instructions from the plaintiff to the master was read in evidence. The rate of demurrage was proved by several witnesses. The defendants' counsel moved for a nonsuit, on the ground that the evidence did not support the declaration; but that question was reserved, and the jury, under the direction of the judge, found a verdict for the plaintiff, for 18 days demurrage, from the 3d to the 21st day of *January*, 1806.

The point reserved and argued was, whether the plaintiff was entitled to a compensation, in nature of demurrage, for the time the vessel was detained at *Surinam*, after the 35 lay days, allowed by the agreement between the parties, had expired.

ALBANY,
August, 1806
ROBERTSON
V.
BETHUNE.
[* 344]

[* 345]

ALBANY,
August, 1808.
ROBERTSON
V.
BETHUNE.

Griffin, for the plaintiff. It is proved, by the master of the vessel, that the detention of the vessel, after the expiration of the 35 days, was by request of the agent of the defendant, and for their benefit. It is a general principle of law, founded in equity and justice, that where a person has expended his time and labor for another, at his request, that he shall be entitled to a reasonable compensation. Suppose a person hires a carriage to take him from *New-York* to *Philadelphia*, and back again, and on his arrival at the latter place, he requests the carriage to wait for him a fortnight, is the owner to receive no compensation for the expense, and loss of time during his stay there? [He was stopped by the court, who desired to hear at the other side.]

[* 346]

Pendleton and *D. A. Ogden*, contra. This was a general ship; and the contract was to carry certain articles for a certain freight. There was no agreement to pay demurrage, nor was there evidence of any such agreement. The right of demurrage arises out of the contract of charter-party, where the entire ship is let to freight, in consequence of a particular clause usually inserted for that purpose. (*Abbott*, 150.) Here the plaintiff stipulated to wait 35 days at *Surinam*, but nothing was said as to any allowance if the vessel stayed a longer time to obtain her homeward cargo. In the case of a charter-party, where the whole ship is let to freight, the merchant has the entire control and direction of the ship, and if he detains her beyond the time stipulated, he must pay demurrage: but there is not an instance of demurrage to be found, in the case of a general ship. It is remarkable, that no case is to be met with of an action of *indebitatus assumpsit*, brought to recover demurrage. In the case of *Jamieson v. Laurie*, mentioned by *Abbott*, (page 158.) the entire ship was let to *Jamieson & Co.*, and they had the whole direction and control of her. This is manifest from their letter of instructions to the master. As it was a suit in *Scotland*, it is not easy to say what was the particular form of action; but it was, most probably, a special action on the case.

Hume v. The East India Company (1 *Wm. Black.* 151 ..) was an action of covenant on a charter-party, and the company were permitted to detain the ship a year, on paying demurrage at a certain rate, and if the ship did not arrive in safety, and deliver her whole cargo, the company were to pay no freight or demurrage. Here the defendants did not bind themselves to put a homeward cargo on board, but they stipulated to pay the freight at all events. But admitting that the action could be maintained for the detention in the nature of demurrage, yet there is no evidence from which a promise to pay can be implied. The agreement of the parties was reduced to writing, and nothing can be intended beyond the written contract. It is not pretended that the defendants themselves delayed the

vessel; but merely that the master, at the request of the consignee, consented to stay after the expiration of the 35 days. It was a request with which the master might comply or not, as suited his convenience. His consent to stay was a mere voluntary courtesy, for which the plaintiff can have no legal claim on the defendants for a compensation. The consignee or agent of the defendants was merely authorized to procure a return cargo; he had no power to bind the defendants to pay demurrage *for the detention of the vessel, beyond the period fixed by the contract. As to the case put of a carriage; suppose the case to be, that the owner of the carriage agrees to take a passenger to *Philadelphia* for a certain price, and on his arrival there, consents to wait for him to return at the same fare, there would be no implied contract to pay the owner of the carriage for staying.

ALBANY
August, 1808.
ROBERTSON
V.
BETHUNE

[* 347]

Colden, in reply. The case of *Jamieson v. Laurie*, if I understand it, is precisely in point, though it is impossible to say what was the form of action in that case. If the defendants cannot recover in the present form of action, they are without a remedy. Whether this was a general ship or not, does not vary the plaintiff's right. It is enough that the vessel has been detained by the request of the defendants or their agent. There is nothing extraordinary in this action. Like all other actions on *implied assumpsits*, it is founded on the principle, that the law presumes that every man undertakes to perform what reason and justice require of him. *Demurrage* is the payment or compensation for the delay of a ship, by the request of the merchant. This is also a suit for delay, in the nature of demurrage; and the only difference between this case and that of a charter-party is, that the rate of compensation, or *demurrage*, has not been fixed by the contract; but the defendants are not the less liable on the *quantum meruit*, to make a reasonable compensation to the plaintiff.

VAN NEEB, J. This was a general ship, in which the defendants had no other interest than what they derived under the special contract. The plaintiff engaged to carry to *Surinam* certain specified articles, and to bring back 200 hogsheads of molasses, for which the plaintiff agreed to pay 2,600 dollars. The contract provides, among other things, that the defendants should be allowed 35 working days at *Surinam*, for discharging the outward and loading the homeward cargo; and it contains this further stipulation, that if any accident should prevent the delivery of the return cargo, (and this must mean a *delivery of it within the 35 days,) the defendants should, in that event, be liable to pay 1,300 dollars for the freight of the goods out. When, therefore, the return cargo was not ready to be put on board, within the 35 days, the master was no longer bound to wait for it; but from that

[* 348]

ALBANY,
August, 1808.
ROBERTSON
V.
BETHUNE.

moment the contract terminated, to all intents and purposes and both parties were absolved from all future liability under it. No provision was made, however, for any compensation for the detention of the ship, in case the 200 hogsheads of molasses should not be put on board within the 35 days. In charter-parties, there frequently is a stipulation that the ship shall, if required, wait a further time to unload and reload, for which the merchant covenants to pay a certain daily sum for demurrage. There is no stipulation of that kind in the present instance, and I cannot perceive any thing in the case from which a promise to pay for the detention of the ship ought to be implied. No obligation ought to be intended beyond those which are imposed by the written contract.

Carstairs, the consignee of the cargo, (but who had nothing to do with the ship,) had no authority to bind the defendants by express stipulation to pay for the detention of the ship. But if he had such power, there is no evidence that he did enter into such a stipulation. The master says, that when he urged *Carstairs* to be expeditious in providing the molasses, *Carstairs* told him that the defendants were not going to pay 2,600 *do'lars*, and not have their full cargo; and that if he insisted on sailing, *Carstairs* said he would turn over to the defendants the 43 hogsheads of molasses which had been put on board for the plaintiff. It is evident, from these expressions, that *Carstairs* had no intention to make the defendants liable for any thing beyond the terms of the written contract, of which he had a copy; and it is fairly to be inferred, from the master's silence as to any extra compensation for the detention of the ship during the whole of the transaction, that he also had no idea that his owners would have a right to demand it. There can be no doubt but that the master waited for the molasses, with no other view than to secure the freight mentioned in the written agreement, to be paid for the homeward cargo.

* 349]

I cannot conceive upon what ground the authority of *Carstairs* to bind the defendants to pay for the detention of the ship, can be maintained. An express authority from the defendants is not pretended, and it certainly does not result from his being consignee of the goods. He was, it is true, to furnish the return cargo, but this could give him no power over the ship. If he had a right to render the defendants responsible for the detention of the ship for one day, he might for a longer period, and this right would be the same, whether the defendants had 5 or 500 hogsheads of molasses. In this way, *Carstairs* might have subjected the defendants to the payment of a sum, amounting to double or treble the value of the molasses. And cases may easily be conceived, where a mere consignee of the goods (if the doctrine contended for by the plaintiff should be recognized) might ruin the merchant. The case of *Jamieson & Co. v. Laurie* differs very essentially from

the present. In that case, there was evidently a letting of the whole ship. *Jamieson & Co.* are said to have sent the ship to *Cronstadt*. They gave the captain his letter of instructions, and they consigned the ship to *Atkyns & Co.* From these and other facts in that case, they appear to have had the exclusive management, possession and direction of the ship during the voyage. Another and a prominent fact in that case is, that the ship was detained by *Atkyns & Co.*, who were the consignees of the ship, and this forms also a striking distinction between the two cases.

The case of the hiring of a carriage, put in the argument, is not analogous to the one now under consideration. There, also, is a letting of the whole carriage, the custody and direction of which is parted with by the owner, for the exclusive use and benefit of the party to whom it is let. Nothing is to be inferred against the defendants from the circumstance of their receiving the molasses on the return of the ship. They considered themselves bound by the special contract to pay, and have, therefore, paid the 2,600 dollars, which they supposed was the extent of their liability. There is reason to suspect that the present demand on the part of the plaintiff was an after-thought. If he had supposed the defendants were responsible for it, it is not very probable that he would have delivered to them the molasses, until this demand, as well as the 2,600 dollars, was paid.

I am of opinion, therefore, that a judgment of nonsuit ought to be entered.

KENT, Ch. J., and YATES, J., were of the same opinion.

SPENCER, J. From the facts appearing in this case, it is evident that *Carstairs*, the agent of the defendants, detained the vessel for their benefit, from the 3d to the 23d day of January; for though the defendants' portion of the return cargo was on board on the 18th of January, the master and crew were employed from that time until the sailing of the vessel. in adjusting the cargo, and getting ready for sea. It remains to inquire, whether this action can be maintained for the detention.

The general principle cannot be denied, that wherever one person does an act beneficial to another, at his request, or by his consent, and which act is not intended to be gratuitous, an action of *assumpsit* will lie for a compensation for the act performed. It was strongly urged, on the argument, that demurrage can only be claimed, where there has been a charter-party, or letting to hire of the entire ship, and then as a matter of stipulation by way of penalty; but no authority was produced to support this doctrine; and I think that the contrary is established in the case of *Jamieson v. Laurie*. (*Abbott*, 158.) That case arose in Scotland, and was decided upon

ALBANY,
August, 1808.

ROBERTSON
v.
BETHUNE

[* 350

ALBANY,
August, 1808.
ROBERTSON
V.
BETHUNE.
[* 351]

the principles of the *English* law, with a view to render the law of *Scotland*, in that respect, conformable to the law of *England*, and was finally decided in the House of Lords. *In that case, there was no charter-party, and the only evidence of the contract was a letter of instructions from *Jamieson & Co.* to the master. The vessel ought to have sailed on the 1st of *September*, on her return voyage; but she waited for the homeward cargo to be shipped by *Jamieson & Co.*, at the instance of their agent in *St. Petersburg*, until the 28th of *October*, when the vessel cleared out. But it is said, that Messrs. *Atkins, E. Rigeul & Co.*, the merchants at *St. Petersburg*, were the consignees of the ship. It is true, that the ship was addressed to them by *Jamieson & Co.*, who were rendered responsible, not because the merchants, to whom the ship was addressed, had any positive control over the ship, but because the master had waited at the request of the agents and correspondents of *Jamieson & Co.* It was admitted on all hands, that the master might have returned empty, or have obtained another cargo, after the 1st of *September*; and the House of Lords finally decided that *Jamieson & Co.* should pay the usual freight, and a compensation in the nature of demurrage, from the 1st of *September*, until the vessel cleared out, and was ready for sea. I can see no material difference between that case, and the one now before the court. They both proceed on the principle, that the plaintiff sustained an injury in remaining with his vessel, waiting for the defendants' cargo, by the direction or means of their agent, and that the party who has enjoyed the benefit is bound to make compensation for the injury.

The form of action appears to me to be the only one adapted to the case, and I know of no other which would so well comprehend the plaintiff's claim.

Some objection was made to the admissibility of the evidence, as to the extent of the injury arising from the detention. It was the only evidence that the nature of the case admitted. The demurrage is necessarily made up of various items, such as the wages and provisions of the crew, the wear and tear of the vessel, and loss of *employment during the detention. As there can be no accurate estimate on the subject, it is proper to receive the opinions of persons conversant in such matters, and acquainted with the nature of the trade.

I am of opinion, therefore, that the plaintiff ought to have judgment.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment of nonsuit.

[* 352]

LEADE and JEPHSON *against* THE COMMERCIAL INSURANCE COMPANY.

ALBANY,
August, 1868.

READE
v.
COMMERCIAL
INS. COMPANY

THIS was an action on a policy of insurance, on the ship *Frances Ann*, on a voyage from *New-York* to *Bourdeaux*, and back to *New-York*.

The cause was tried at the *New-York* sittings, the 12th of December, 1867, before Mr. Justice *Spencer*.

The vessel sailed from *New-York* through the *Long-Island Sound*. The master testified that he was instructed by his owners to take that course, in order to avoid the chance of detention or delay by *British* ships of war, two or three of which were then cruising off *Sandy-Hook*. There was no particular or unnecessary delay during the passage through the *Sound*. The vessel sailed the 7th of September, 1867, and had on board a number of *Frenchmen*, as passengers, some of whom were sent home on *account of the *French* government, and part of the cargo consisted of colonial produce.

There are two passages to the sea from the port of *New-York*. One of them is through the *Sound*, which separates *Long Island* from the main land; the other is through the *Narrows* to *Sandy-Hook*. The latter is the most usual and convenient passage for vessels bound to sea. Homeward bound vessels often come in through the *Sound*, but that depends on the state of the weather, and the part of the coast first made. Outward bound vessels frequently go to sea through the *Sound*; and there are regular *Sound* pilots. It did not appear that leave was ever asked, or thought necessary to be obtained from the insurers, to go through the *Sound*. Several witnesses testified, that under the circumstances, it was prudent for the *Frances Ann* to go through the *Sound*, as one or more *British* frigates were at that time off the *Hook*, and her having *French* passengers and colonial produce on board would have rendered her more liable to detention.

The ship having suffered considerable damage during her voyage, it became necessary to repair her at *Bourdeaux*.

The ship was consigned by the plaintiffs to *P. Coudere*, jun., a merchant in *Bourdeaux*, from whose deposition it appeared, that he acted as the consignee of the ship at that place: that he paid for the repairs in cash, and with his own funds, and took a *bottomry bond* on the ship from the captain, at his own risk, at 25 per cent. marine interest; that he received the freight at *Bourdeaux*, but received it on account of a *Mr. Rousillot*, who had drawn on him for more than the amount; and the value of the cargo belonging to the plaintiffs was absorbed by their

Where a vessel was insured from *New-York* to *Bourdeaux*, and had *French* passengers on board, and the owners instructed the master to go to sea through the *Sound*, in order to avoid the chance of detention by *British* cruisers, then off the *Hook*, and the master went

[* 353]

through the *Sound*, instead of going through the *Narrows*, to the *Hook*, which is the most usual and least dangerous route, it was held not to be a deviation.

A vessel was insured from *New-York* to *Bourdeaux*, and consigned, with a part of the cargo belonging to the owner, to a person at *Bourdeaux*, on whom the owner had drawn bills to the full amount of the goods and freight; and the master applied to the consignee for money to make the necessary repairs, to enable the vessel to return to *New-York*, and the consignee advanced the money, and took a *bottomry bond* for the amount. It was held, that the insurers, under the circumstances of the

case, were not bound to pay the *bottomry bond*, but only for the repairs. A master of a ship may, in a case of necessity, *bona fide*, *bottomry* the ship, at the port of destination, as well as at any other foreign port.

ALBANY,
August, 1868.

READER
V.
COMMERCIAL
INS. COMPANY.

[* 354]

drafts on *London*, which the consignee had engaged to pay for their account.

The master of the vessel testified, that he had no funds to defray the expense of repairs, nor did he know of any person at *Bourdeaux*, who had funds or effects of the plaintiffs; that the repairs were all paid for by **Coudere*. The master applied to no other person, and was directed to *Coudere* by the plaintiffs. When the repairs had commenced, *Coudere* informed the master, that he had no funds, and that the master must secure him by bills drawn on the plaintiffs, or by a bottomry bond, to which the master agreed. When the repairs were completed, *Coudere* demanded a bottomry bond as his security, which the master accordingly gave. The ship was repaired on the credit, and at the sole expense of *Coudere*, and the master incurred no personal responsibility whatever, except what arose from his execution of the bottomry bond.

On the return of the ship to *New-York*, the defendants were requested to take up the bottomry bond, and on their refusal, the ship was libelled in the District Court of the *United States*, and the amount recovered, which was paid by the plaintiffs, to prevent a sale of the ship.

A verdict was taken for the plaintiffs, subject to the opinion of the court on the following questions:—

1. Whether there was a deviation.
2. Whether the defendants were liable for the *marine interes*. on the bottomry bond given for the expenses of repairs at *Bourdeaux*.

It was agreed, that the amount of the sum to be paid, under the opinion of the court, should be adjusted by three persons, who were named in the case.

Hopkins, for the plaintiffs. 1. All the witnesses agree, that going through the *Sound*, instead of the *Narrows*, was, under the circumstances of the case, prudent and justifiable. *Emerigon* (vol. 2. p. 58, 59, 60.) mentions the case of the *Benjamin*, insured from *St. Domingo* to *France*. This vessel, with several others, in order to avoid the *English* cruisers, went through the *Straits of Bahama*, instead of taking the usual route, and was afterwards captured. On an appeal, the Court of *Cassation*, at *Paris*, held, that the insurers were bound to pay for a total loss. The same author is of opinion, that going out of the usual route, in order to avoid the payment of an oppressive or illegal *toll, is justifiable, and does not amount to a deviation. (a) And *Marshall* says, that to avoid an enemy, is a cause of excusable deviation. (*Marsh.* 412.)

[* 355]

(a) *Roccus* is also of opinion, that the insured may deviate, from a necessary and just cause; as, for example, to avoid a storm, or an enemy. "*Si iter mutaverit ex aliqua justa, et necessaria causa, puta, ex causa refectionis, vel ad evitandam maris tempestatem, vel ne incideret in hostes; siquidem in istis casibus, mutato itinere, tenetur assicurator.*" *De Assec. N.* 52. 93. See also *Pothier, Traité des Ass. n.* 51.

2. The vessel arrived at *Bordeaux*, in so shattered a condition, that repairs were necessary. The plaintiffs were not bound to have funds sufficient to defray the expense of repairs. If they had no funds there, the master was justifiable in taking up money for that purpose, on bottomry; and the bottomry bond becomes the measure of damages for which the insurers are liable. I rely on the case of *Dacosta v. Newnham*, (2 Term Rep! 407.) as containing the established doctrine on this subject, and as applicable to the present case.

ALBANY,
August, 1808.

READER
V.
COMMERCIAL
INS. COMPANY

Wells, contra. 1. It is agreed that the passage through the *Narrows*, and by the way of *Sandy-Hook*, is the most usual and customary route for vessels proceeding from the port of *New-York*. Going through the *Sound*, therefore, amounts to a deviation, unless excused by imperious circumstances. It is well known, that the danger of navigation through the *Sound* is much greater than through the *Narrows*. Admitting that there was a danger of detention or capture by *British* cruisers off the *Hook*, there was also, on the other hand, the greater danger of the navigation through the *Sound*. There was, then, a case for deliberation and the exercise of judgment, as to a choice of the route. In ordinary cases, where two routes occur, the master must decide, according to his best skill and discretion, which of them to take. The insurers are entitled to the benefit of a free exercise of the master's judgment, whose opinion ought not to be controlled by the owners of the vessel. If the insured undertake to *prescribe to the master which course he is to take, the insurers are discharged, in case of a loss happening on the route prescribed. (*Marsh. 407. Middlewood v. Blakes*, 7 Term Rep. 162.) Here the plaintiffs, without consulting the defendants, instructed the master to go through the *Sound*. As the insurers were on the spot, their consent ought to have been obtained.

[* 356]

2. I contend that the master, in this case, had no authority to bottomry the vessel; and if so, the defendants are liable for no more than the amount of necessary repairs. The power of the master to borrow money on bottomry, arises out of the necessity of the case, and is limited by fixed bounds. (*Abbott*, 112.) It is essential to the exercise of this power, that no other means of supplying the wants of the ship exist; and that it is necessary to the safety of the ship, and the prosecution of the voyage. This power cannot be exercised in the place where the owners reside, nor where the owners have funds provided, or have agents or consignees who are bound to furnish the requisite funds on the credit of the owners. (*Peters's Admiralty Decisions*, p. 302, 303.) In the present case, the vessel was not forced by necessity into an intermediate port, but arrived at her place of destination, where the plaintiffs had a regular consignee or agent. The master had goods on board belonging to the plaintiffs, and for which he was entitled to receive freight.

ALBANY,
August, 1808.

READER
V.
COMMERCIAL
INS. COMPANY.

[* 357]

The freight money was the proper fund out of which to defray the expense of repairs. The master does not state, that he made any attempt to procure money in any other way. *Coudere* required bills on the plaintiffs, or a bottomry. The master, having his option, ought to have drawn bills on the owners, rather than to subject them to the payment of a high marine interest. Again, the money must be advanced on the faith of the ship, but the consignee advanced the money before the master had decided to give a bottomry. *Coudere* appears as regular consignee of the vessel and of the goods of the plaintiffs, who possessed a credit with him. He ought not, then, to have exacted the same security as a stranger. It would be dangerous to allow a consignee to take bottomry bonds, in such a *case, as a collusion between him and the master, for the purpose of exacting from the owner a heavy *premium* for advances, would be so easy. The necessity of the case ought to be strong and manifest; it ought to appear that the last and only resource of the master for the safety of the ship, and the completion of the voyage, was to resort to this species of loan.

3. Admitting, however, that the master had a right to bottomry the vessel at her port of destination, yet it does not follow, that the insurer is liable for the *marine interest*. Lending money on bottomry resembles the contract of insurance; in each, a *premium* is received, calculated upon the nature and length of the voyage, the risk of which is run by the insurer in the one case, and the lender in the other. As the insurer derives no benefit from the loan, he ought not to be obliged to pay the *premium*. Ordinary interest is never, in fact, charged on the amount of disbursements for repairs, for which the insurer is liable; *a fortiori*, he ought not to be held to pay *marine interest*. The insurers on this policy undertake to pay in 30 days after proof of the loss; and until the accounts of the repairs are produced, there can be no proof of loss; and the contract of indemnity does not extend further than the repairs.

The case of *Dacosta v. Newnham* is different from the one before the court. There the insured, on advice of the accident, offered to abandon, and the insurer insisted upon the vessel's being repaired. The insured acted under the orders of the insurer, and a bottomry bond having been given for the repairs, which they refused to pay, they were held liable for all the consequences of their refusal. The plaintiff had an undoubted right to abandon for a total loss, and the question whether the defendant was bound to pay *marine interest*, did not arise. The case was decided on a different principle.

[* 358]

Hopkins, in reply. The insured, on his contract of indemnity, is bound for all the loss and injury arising from any of the perils mentioned in the policy, and for every *necessary repair during the voyage. If the master acted *bona fide* in giving the bottomry bond, and there was no other mode of raising the

money to make the necessary repairs, the defendants ought to pay the amount of the bond; it is a direct consequence of the necessity of repairs occasioned by the perils of the sea. It is usual to advance the money first, and take the security afterwards. The consignee had a right to insist on the security upon the vessel, without trusting to the personal responsibility of the owners. If a total loss has been prevented by making the repairs, the defendants have been benefited, and ought to pay the principal and interest of the bond.

ALBANY,
August, 1808.

READER
V.
COMMERCIAL
INS. COMPANY

VAN NESS, J., delivered the opinion of the court. There are two questions in this cause:—

1. Was the going to sea through the *Sound*, under the circumstances of this case, a deviation? And,
2. Are the defendants liable for the marine interest on the money borrowed on bottomry at *Bordeaux*?

There are two passages to sea from the port of *New-York*; one by the *Sound*, and the other by the *Narrows*. The former has of late years been frequently pursued, but the latter is used in far the greater number of cases, and is the most usual and ordinary course for vessels, sailing from the port of *New-York* on a foreign voyage.

In every contract of marine insurance, there is an implied condition on the part of the insured, that the ship shall proceed on her voyage to her destined port, in the shortest, safest and most usual course. If this be not done, and the ship, without just and reasonable cause, leaves the regular and customary track, it is a deviation, and from that time the policy is at an end, and the insurer is discharged from all subsequent responsibility.

If there were no evidence in this case to justify the departure of the ship from the most usual and ordinary course, we are inclined to think that here would have been a deviation; but under all circumstances, we consider that there was a just and reasonable ground for such departure, though there may not have been an *absolute* necessity for it.

The ship was bound to a *French* port, having a number of *French* passengers on board, some of whom were sent home on account of the *French* government, and part of her cargo was colonial produce. At the time she sailed, the *Cleopatra*, and other *British* ships, were off *Sandy-Hook*, who captured several *American* ships, and there was considerable apprehension on this subject among the merchants. Under these circumstances, the owners were justifiable in instructing the captain to go by the way of the *Sound*, and there was no occasion to apply to the underwriters for their consent to a measure so obviously the dictate of prudence, and for the benefit of all concerned. It is no deviation to go out of the ordinary track to avoid danger. (*Marshall*, 408.) That in this case, there was danger, not only of detention, but even of capture and

[*359]

ALBANY,
August, 1808.

READE
v.
COMMERCIAL
INS. COMPANY

condemnation, cannot reasonably be doubted. To avoid this danger, it was a prudent exercise of the discretion resting with the owners, to direct the master to leave the customary passage to the sea, and to pursue another, not new and unexplored, but occasionally used, and in which there were regular pilots. The owners, in giving these instructions, could have no sinister views, and it is not pretended but that they acted with the most perfect good faith, for the benefit of all parties interested, and with the sole view to conduct the ship and cargo by the safest course to her port of destination.

It has been said, that in cases where a departure from the usual course is excusable, for reasons growing out of the circumstances existing at the time, the insured have a right to the opinion of the master, and to the uncontrolled exercise of his discretion. This is true to a certain extent: As, where the voyage has been commenced, and when the circumstances which render such a departure expedient, are unknown to the owners, and when, consequently, *they could not form so correct an opinion as the master. Such was the case of *Middlewood v. Blakes*, (7 Term Rep. 162.) But when the departure takes place, as in the present case, where the owner is on the spot, and well acquainted with all the circumstances, and, in all probability, most competent to judge of their urgency and weight, there can be no use, neither is there any reason or necessity for consulting the master, or leaving the course to be pursued to his discretion.

[* 360]

Whether the defendants are liable for the marine interest or not, for the money borrowed by the master at *Bourdeaux*, is the next question; and in the consideration of which, it is taken for granted, that the repairs of the vessel were rendered necessary by the injuries she had sustained in the course of her voyage, by the perils within the policy, and for which, consequently, the insured are liable.

The general power of the master to hypothecate the ship abroad, for the purpose of raising money necessary for completing the voyage, is not questioned, but it is objected in this case, that such right does not exist at the port of destination; that there was no necessity for resorting to this mode of raising money; and that, at all events, admitting the right of the master in this case, still it was not so exercised as to subject the insurers to the payment of the marine interest.

The only limitation of the master's right to hypothecate the ship, in case of necessity, is, that it shall be exercised *abroad*, and not in the place where the owners reside. The reasons from which the origin of this right is deduced, seem to apply with as much force to the case where the necessity for exercising it arises at the port of destination, as at any other port into which the vessel may have been driven in distress. The only difference between the two cases is, that in the one, the necessity which justifies the exercise of the right, is more

palpable and manifest than in the other. Freight is frequently made *payable, and the insured commonly have a correspondent and credit at the port of destination, and while the captain can find resources from either of these, he would not have a right to pledge the ship. But it does not follow, from thence, that if the master does not receive freight, and cannot borrow money upon the credit of the insured, that he may not pledge the ship. The only and important inquiry must necessarily be, were the exigencies of the case such as to render a pledge of the ship indispensable, and that being granted, the right results, of course, wheresoever the vessel may then be. Suppose, in the case of an insurance out and home, and the injury to the vessel happens at the port of delivery, or at sea, when the port of delivery is the nearest port into which the vessel can put, and that the freight is not payable until the ship's return, and the master is unable to procure money for the necessary repairs, to enable him to complete the voyage in any other way than upon bottomry, what is he to do? One of two things; he must either pledge the ship, or give up the voyage. By doing the one, he may, at a trifling loss to the underwriter, repair the ship and perform the voyage; by doing the other, the underwriter may be subjected to a total loss.

Abbott, Marshall and Park recognize the master's right to borrow money on bottomry in a foreign country, whenever it is essential to the safety of the ship and the success of the voyage: and the term "foreign country" is used in contradiction to the place of the owner's residence. (*Marsh. on Insur.* 638. *Park on Insur.* 413, 414. *Abbott on Shipping*, 118.) So also are the laws of the *Hanse Towns*, (art. 3.) and of *Wisbuy*, (art. 43.) See also the *Marine Ordinance of France*, (art. 17. and 19. book 2. tit. 1.) Upon principle, therefore, as well as authority, we are satisfied, that in cases of necessity, and when the master cannot otherwise procure the money, he may borrow it on bottomry, and hypothecate the vessel for the repayment of it, as well at the port of destination, as at any other foreign port.

*But there are circumstances in the present case, which ought to induce the court to lean against rendering the insurers liable for the marine interest.

The bottomry bond was given to the consignee of the ship, and of the plaintiffs' part of the cargo. The consignee was the person to whom the master alone applied, and upon whom he relied, as he says, for every thing; and there is every reason to believe, that the necessity of repairs and of money for that purpose, was made known to the consignee upon the arrival of the ship. Notwithstanding this, he diverted the funds in his hands to other objects, and advanced his own money at an interest of 25 per cent.

To render the insurer liable for *marine interest*, it ought evi-

ALBANY.
August, 1808.

READER
V.
COMMERCIAL
INS. COMPANY.
[* 361]

[* 362]

ALBANY,
August, 1808.

BENNETT
v.
IRWIN.

dently and clearly to appear, that there were no other means of raising money than by a bottomry bond.

The conduct of the consignee is not free from all suspicion. If the master had pressed him to make the advances for bills upon the plaintiff, he might have agreed to accept them. It does not appear, neither can it be fairly inferred from the evidence, that the master ever attempted to obtain the money on the credit of the owners; but, on the contrary, it appears that he at once agreed, either to give the bills or the bottomry bond; and it is even doubtful whether the master had not himself the election to give the one or the other. The consignee did not advance the money exclusively on the engagement to give a bottomry. It was the duty of the master to have exhausted all other means of raising the money, before he could legally subject the insurer to the payment of an extravagant marine interest. He did not do so, and it is questionable, whether this bond was valid, even as against the owners; but we are clearly of opinion, that the insurers cannot be affected by it.

[* 363]

The opinion of the court, therefore, is, that the marine interest must be deducted from the amount of the verdict, *and that the plaintiffs must have judgment for the residue only.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment for the plaintiffs.

BENNETT and Wife, Administrators of VANCE, against
IRWIN.

In an action of covenant for a breach of the covenant of seisin, &c., in a deed, the defendant pleaded. 1. "That the plaintiff, after the deed to him, in consideration of 1,000 dollars, sold, released and quitclaimed all his right and title in the land, to the defendant," &c. 2. "That before the plaintiff had sustained any damage by a breach of the covenants in the deed to him, he sold, released and quitclaimed all his right, title and interest in the land, to the defendant." 3. "That in consideration of 1,000 dollars paid to him, the plaintiff agreed to give up the deed to the defendant." The defendant demurred to the 1st and 3d pleas, and replied to the 2d plea, that the plaintiff had sustained damage before the release, by reason of the breach of the covenant of seisin, to wit, by paying to the defendant 1,408 dollars for the land, when the defendant was not, in fact, seised, &c., and tendered an issue thereon, to which replication there was a special demurrer: It was held, that the subsequent reconveyance of the land, by the plaintiff, to the defendant, was not a release or extinguishment of the covenants in the defendant's deed; (a) that the 1st and 3d pleas were bad, and though the replication to the 2d plea was bad, yet as the 2d plea was also bad, the plaintiff was entitled to judgment on the demurrer.

THIS was an action of *covenant*. The declaration set forth a deed-poll, made the 26th *January*, 1797, whereby the defendant, in consideration of 1,408 dollars, conveyed a certain lot of land to the intestate, and covenanted, that he was well seised in fee, and had good right to convey, &c., and assigned for breach, that the defendant was not seised, &c.

The defendant pleaded six pleas.

1. That the intestate, on the 30th *October*, 1797, by deed

(a) See *Jackson v. M'Cracken*, 4 *Johns.* 199.

poll, in consideration of 1,000 dollars, sold, released and quit-claimed to the defendant, all the intestate's right, title and interest in the said lot, free and clear from the intestate, his heirs and assigns, &c., and concluded with a *verification*.

ALBANY,
August, 1868.

BENNETT
v.
IRWIN.

2. That after the covenants, mentioned in the plaintiff's declaration, and before the intestate had sustained any damage, by reason of any breach thereof, the intestate, by his deed, in consideration of 1,000 dollars, dated the *30th *October*, 1797, bargained, sold, released and quitclaimed all his right, title and interest, &c. in the premises to the defendant, &c., with a *verification*, &c.

[* 364]

3, 4, 5. Payment, on the 30th *October*, 1797, by the defendant, of 1,000 dollars, to the intestate, who accepted the same in full satisfaction and discharge of all damages, &c.

6. That in consideration of 1,000 dollars paid to the intestate, he agreed to give up and deliver to the defendant, as his property, and for his use, the said deed-poll, and that he gave to the defendant an order in writing on his wife, to that effect.

To the 1st and 6th pleas, there was a general demurrer and joinder. The plaintiff took issue on the 3d, 4th and 5th pleas.

To the second plea, the plaintiff *replied*, that before the deed poll in that plea mentioned was executed, the intestate had sustained damages by reason of the breaches assigned, to 4,000 dollars, to wit, by paying to the defendant the said sum of 1,408 dollars, when in fact the defendant was not at that time seised, nor had power to sell, &c., and concluded to the country.

To this replication there was a special demurrer, and the plaintiff assigned for causes of demurrer,

1. That the replication is not an answer to the whole plea.

2. Because it is argumentative, states no new matter, and puts at issue a mere conclusion of law.

3. Because it concludes to the country, and not with a *verification*, &c.

The cause was submitted to the court without argument.

VAN NESS, J., delivered the opinion of the court. The first and only important question in this case is, whether the first plea is a good plea in bar. The defendant, by setting up a reconveyance to him by the intestate, of the lot described in the deed containing the covenants upon which the suit is brought, admits, that the *defendant was not seised of the land, and that he had no power to sell, and, consequently, that he had no right to receive the consideration paid to him. But he contends, that he is discharged from the liability resulting from his covenants, in consequence of this reconveyance.

[* 365]

If the defendant is discharged, it must be because the reconveyance of the land operates as a release, or as an extinguishment of the covenants in his deed. The intestate acquired no title to the land which the defendant pretended to convey to

ALBANY,
August, 1808.

BENNETT
v.
IRWIN

him, and there was, therefore, a breach of the covenants of seisin, the moment the deed was executed, and the intestate was entitled to recover from him the consideration expressed in the deed. This is a personal covenant, and does not run with the land. (2 *Johnson*, 1. *Greenby and others v. Wilcocks*.)

The right acquired by the intestate under the covenants in the deed, are unconnected with, and independent of the right to the land; and I am at a loss to understand how a release of the intestate's right and title to the land, when he had no right or title at all, can be made to operate as a release or extinguishment of the covenants of seisin.

The transaction is plainly this; the defendant sells to the intestate a lot of land for 1,408 dollars, and covenants, that he has a good and perfect title to it. He, afterwards, for reasons which do not appear, takes a quitclaim from the intestate for the same lot, for which he thought proper to pay 1,000 dollars. It is, afterwards, discovered that the defendant never had any title to the lot, and that he wrongfully induced the intestate to give him a large sum of money for it. This money the representatives of the intestate now seek to recover back. All this the defendant admits, but says, that he ought not to refund the money, because, after he received it, he paid the defendant, for reasons of his own, 1,000 dollars, to induce him to execute a quitclaim of his right and title to the lot.

* 366]

What inducement the defendant had to take this reconveyance and pay 1,000 dollars for it, is not disclosed by this plea. It may be, that the intestate had obtained a *valid title for the lot from some other source. At any rate, his having taken the quitclaim cannot be considered as amounting to a discharge of his covenants; for if that had been contemplated by the parties, a less circuitous mode of expressing their intention would at once have occurred and been adopted.

I have not met with any cases which show that a release of an estate works an extinguishment of a covenant of seisin previously broken; but there are some which seem to support the contrary doctrine. (*Austin v. Mayle, Noy*, 118. 2 *Brown*, 169. 167. *Freeman*, 41.)

Had the reconveyance from the intestate been of the land (and not a mere quitclaim of his right and title thereto,) perhaps it would have been competent, under a different form of pleading, for the defendant to have availed himself of the reconveyance by way of defence.

If, for instance, the defendant had pleaded that he was seised and had power to sell, a reconveyance, such as I have just mentioned, might, probably, have been given in evidence in support of that plea; and it would have then been a question whether the plaintiffs would not have been estopped from contesting the defendant's title at the time he executed his deed.

But a mere release or quitclaim, unless the releasee is in possession, is void.

The second plea is substantially like the first. The only difference between them is, that in the second, the release from the intestate is averred to have been executed before he had sustained any damages by reason of the breach of the covenants stated in the declaration.

Instead of demurring to this plea, the plaintiffs, by their replication, have attempted to take issue on this averment, and to this replication there is a demurrer and joinder in demurrer.

This replication is bad; but if the plea be bad also, the plaintiffs must have judgment, as the first fault in pleading has been committed by the defendant.

*If the first plea is bad, it is clear the second cannot be supported.

The sixth plea is, on the face of it, untenable. (*Rogers v. Payne*, 2 Wils. 376.)

The court are, therefore, of opinion, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

ALBANY,
August 4, 1808.

BARLOW
T. LUD

[* 367]

BARLOW against TODD.

THIS was an action of *debt*. The declaration was in the usual form, for the penalty of an arbitration bond, dated the 9th *January*, 1807. The defendant, after craving *oyer* of the condition, which was to abide the award of certain arbitrators therein named, to be made on the 2d *February*, 1807, or in a reasonable time thereafter, &c., pleaded that the arbitrators did not, at the time specified, or within a reasonable time thereafter, make an award, under their hands and seals, of and upon the premises, submitted, &c., and concludes with a verification, &c. The plaintiff replied, that the arbitrators, on the 20th *March*, 1807, made an award in writing, under their hands and seals, of and concerning the premises, and set forth the award, by which it was awarded, that the defendant should pay to the plaintiff 1,300 dollars and 94 cents, within 90 days from the date, &c., of which notice was given to the defendant, and averred a breach, in not paying the sum awarded.

The defendant rejoined, that he made a demand on the executors of *William Barlow* (the plaintiff being one of the executors) for 375 dollars and 40 cents, being money paid by the defendant to the use of the said *William Barlow*, in his

In an action of debt, on an arbitration bond, the defendant pleaded no award, the plaintiff replied, setting forth an award, and the defendant rejoined that the award was not final, &c. On demurrer, the rejoinder was held to be a departure from the plea, and, therefore, bad. Where an award, on the face of it, is final, nothing *dehors* the award, can be pleaded or given in evidence against it. (a)

(a) *Efner v. Shaw*, 2 Wend. Rep. 567. See the cases referred to, p. 569. An award made and published on *Sunday* is void. *Story v. Elliott*, 8 Cow. Rep. 27. *Allen v. Watson*, 16 Johns. 205.

ALBANY,
August 1808.

BARLOW

v.
TODD.

[* 368]

life-time, and claimed to be allowed that sum in the account with the executors, which they refused *to admit; and though the demand was existing against the executors, and was claimed and insisted on before the arbitrators, and submitted to them at or before the 20th *March*, 1807, yet they made no award thereon, but postponed and reserved the consideration thereof to another time; and that no award has been made on the said claim, but it still remains undetermined, and so the defendant saith that the arbitrators did not make a final award, &c., and concludes with a verification.

To this rejoinder, the plaintiff demurred, and the defendant joined in demurrer.

Edwards, in support of the demurrer. The award, on the face of it, is final and complete, and nothing *dehors* the award, can be alleged or given in evidence against it. (2 *Wils.* 148.) [He was stopped by the court, who desired to hear the other side.]

Pendleton, contra. The award was not final, for a question was reserved to be decided at a future day. If so, it was a void award. The award may, on the face of it, be final and conclusive; but from facts brought before the court, it may be shown not to be final. Where the award is void, the defendant may plead no award, and in his rejoinder he may show how it is not final. (1 *Wils.* 122. *Cro. Jac.* 508. 515. *Palmer*, 110. 146. *Hob.* 218.)

The replication also is defective. It ought to have shown that the award was, in form and substance, according to the submission. (2 *Saund.* 61. i. n. 3. 1 *Str.* 116. 3 *Lev.* 164.)

Baldwin, in reply, cited *Kyd*, 300. 327. 336. 357. 2 *Vesey*, 315. *Cro. Jac.* 200. 355. 1 *Lev.* 127. 301. *T. Raym.* 22. 94. 1 *Mod.* 229.

SPENCER, J., delivered the opinion of the court. The very point made in this cause, arose in the case of *Harding v. Holmes*, (1 *Wils.* 122.) upon precisely the same state of pleadings. The defendant's counsel gave up the point, and judgment was given for the plaintiff. Upon the authority of the case of *Roberts v. Mariet*, (2 *Saund.* 188.) the rejoinder in this case is a departure, for by the plea the defendant has denied that an award was made, and in the rejoinder *he admits that one was made. It is an established principle, that a rejoinder must maintain the plea, and cannot set forth any other matter at variance with it.

These, however, were cases decided before the principles applicable to awards were well understood and settled. It is now well established that at law, nothing *dehors* the award invalidating it, can be pleaded or given in evidence to the

[* 369]

jury. (2 Wils. 148.) The arbitrators are judges chosen by the parties themselves, and their awards are not examinable in a court of law, unless the condition is to be made a rule of court, and then, only, for corruption or gross partiality.

In the case of *Newland v. Douglass*, (2 Johns. 62.) the court decided, that proof of the mistake of arbitrators was inadmissible at law, and that a court of chancery alone could correct a palpable mistake of arbitrators. Their award is like a judgment. Courts of law cannot listen to suggestions contradicting the award, or impeaching the conduct of the arbitrators.

We are, therefore, of opinion, that the plaintiff ought to have judgment.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment for the plaintiff.

ALBANY,
August, 1808

M'LEAN
v.
RANKIN.

M'LEAN against RANKIN and HEYER.

THIS was an action of *assumpsit*. The declaration contained the usual counts for money had and received to the use of the plaintiff, money paid, &c. The cause was *tried at the New-York sittings, in December, 1807, before Mr. Justice Spencer.

One *Bancker* was indebted to the *United States*, for duties on goods imported into *New-York*, to secure the payment of which, he, and the plaintiff, as his surety, executed four bonds to the *United States*. The bonds not being paid by *Bancker*, the plaintiff was sued and judgment recovered against him; and, in satisfaction of the principal, interest and costs, he paid 879 dollars and 11 cents.

Bancker, after he gave the bond, went to the *West-Indies*, on mercantile business, being then indebted to several persons in *New-York*. He remained in the *West-Indies*, and in February, 1806, shipped a quantity of goods to the defendants, directing them to sell the same on commission, and, after paying themselves a small debt due to them out of the proceeds, to pay over the residue to the father of *Bancker*, for the payment of his other creditors. He, at the same time, wrote to

To entitle the
United States

[* 370]

to a preference over other creditors; it must be shown that the debtor was insolvent and had voluntarily assigned all his property for the benefit of his creditors; or that an attachment has been taken out against his property, as an absconding and absent debtor, and prosecuted to effect. If an attachment is taken out, and afterwards withdrawn, by consent of creditors, (a) without any pro-

ceedings under it, it is inoperative, and gives no right of preference to the *United States*

A consignment of goods by a debtor abroad, though insolvent, with directions to have them sold and the proceeds paid to his creditors, in *New-York*, is not such an assignment of his property, as will entitle the *United States* to a preference.

(a) See as to the right of a creditor under the act for relief against absconding debtors, to withdraw his attachment, *Frederic v. Makon*, 16 Johns. 162.

ALBANY,
August, 1808.

M'LEAN
V.
RANKIN.

his father, informing him of the shipment, and that the property was intended for the payment of his debts in New York.

The defendants received and sold the property, the proceeds of which, after deducting the debt due to the defendants, and their commissions, exceeded the debt due to the plaintiff, for the money paid at the custom-house, on account of *Bancker*.

Bancker was understood by his creditors in New-York, to be insolvent, but the precise time when he became so did not appear.

After the property was received by the defendants, an attachment was taken out against *Bancker*, by one of his creditors, under the act giving relief against absconding and absent debtors; but the attachment was withdrawn, in consequence of an agreement made the 7th April, 1806, between the creditors and the defendants, that the latter should sell the property, and distribute the proceeds among the creditors of *Bancker*. The property was accordingly sold, and the proceeds are still in the hands of the defendants.

[* 371]

*The father of *Bancker* has never claimed the property; nor did it appear that *Bancker* had consented to the arrangement between his creditors and the defendants. An objection was made, at the trial, that the evidence of these facts did not support the plaintiff's declaration, and the question being reserved by the judge, a verdict was taken for the plaintiff, for 973 dollars, subject to the opinion of the court on the question, whether the plaintiff was entitled to recover.

Sanford, for the plaintiff. The question is, whether the plaintiff, under the act of Congress to regulate the collection of duties on imports and tonnage, is entitled to a preference to the other creditors of *Bancker*. To entitle the *United States*, and of course the plaintiff, to a preference, the debtor must be insolvent, and make a voluntary assignment of his property, or an attachment must have issued against *Bancker*, as an absent or absconding debtor.

It is stated as a fact, that *Bancker* was insolvent; but the time of his insolvency is not proved. Though he did not execute a formal assignment under his hand and seal, yet it was a voluntary transfer and delivery of this property to the defendants, expressly for the benefit of all his creditors. The goods came into the hands of the defendants by consignment, and the proceeds are held by them under the directions of *Bancker*, for the benefit of his creditors, which is tantamount to an assignment.

Again, the property was attached by a regular process of attachment, taken out against absconding and absent debtors, which is one of the cases in which the *United States* are entitled to a preference. That the attachment was afterwards

withdrawn, cannot vary the right of the *United States*, which attached the moment the process issued.

ALBANY,
August, 1808

M'LEAN
V.
RANKIN.

[* 372]

Wells, contra. The preference given by the act of Congress, is in derogation of the equal rights of creditors, and of the general policy of the law, in regard to the distribution of the estates of bankrupt and insolvent debtors; the party *who claims the preference, ought to be held to strict proof of his right. The period when *Bancker* became insolvent is not shown. It does not appear that he was insolvent when the goods were shipped, or when they came into the hands of the defendants; and even if he were insolvent, mere insolvency does not entitle the *United States* to a preference. There must be either a voluntary assignment by the debtor, an attachment of his property as an absent or absconding debtor, for the benefit of all his creditors, or bankruptcy. The insolvent must do some act, making a disposition of his entire property, before the right of the *United States* to a preference can attach; but there is no evidence whatever of such an assignment.

It was a mere shipment of goods in the ordinary course of business, with directions to pay certain debts. The assignment, intended by the act, is a regular assignment of all his property, by the debtor, expressly and avowedly for the benefit of all his creditors.

It does not appear that the defendants were to pay over, or distribute the proceeds of the goods, among all the creditors, *pari passu*, nor that these creditors acquired any legal or equitable right by the act of consignment which they could enforce against the defendants.

An attachment, it is true, was issued, but it was withdrawn before any proceedings took place under it, and it must now be considered, in every legal view, as never having existed. To make out a case of attachment, in which the law of the *United States* is to operate, it should be shown that it was prosecuted to effect, and that trustees of the estate of the debtor were appointed, pursuant to the act of the legislature of this state. Until the property became vested in trustees or assignees under the act, the right of preference could not attach. The voluntary arrangement between the creditors and the defendants, without the knowledge or assent of *Bancker*, to distribute the proceeds among all the creditors, cannot vary the case.

*In the case of *The United States v. Hooe and others*, (3 *Cranch*, 73—91.) the Supreme Court of the *United States* decided, that the *United States* had *no lien*, in a case of a voluntary assignment, unless it was an assignment of *all* the property of the debtor.

[* 373]

Baldwin, in reply. The fact of insolvency is stated, and

ALBANY,
August, 1808.

M'LEAN

v.
RANKIN

enough appears to authorize the inference, that *Bancker* was insolvent, at the time the goods were consigned. It is not necessary that there should be an insolvency in every case. A man may be an absconding or absent debtor, without being an insolvent. The meaning of the act of Congress clearly is, that whenever the property of a debtor becomes transferred to trustees, or assignees, voluntarily, or by process of law, for the benefit of his creditors, the *United States* should have a preference over all other creditors. It is enough that the property of the debtor has passed into the hands of trustees for that purpose. The defendants acknowledge themselves as trustees, and may be made to account, in that character, to those who are beneficially interested.

SPENCER, J., delivered the opinion of the court. The plaintiff having, as surety for *Oliver Bancker*, in a bond to the *United States*, for the payment of duties, paid the same, is entitled to the same right of preference as the *United States*.

The plaintiff's claim is founded on these facts, that *Bancker*, being insolvent, has made a voluntary assignment of his property, for the benefit of his creditors, to the defendants, who have received from the proceeds of the sales thereof, sufficient to pay the plaintiff his demand.

The evidence is loose as to the time of *Bancker's* insolvency, as well as respecting the fact of insolvency itself; but if it be admitted that he was insolvent at the time of the shipment of the merchandise to the defendants, there is still an insuperable difficulty to the plaintiff's recovery. It does not appear by the case, that *Bancker* has assigned his property within the purview of the act of Congress. *It is stated that *Bancker*, soon after the execution of the bond to the *United States*, went to the *West Indies*, on mercantile business, being then much indebted in *New-York*, and that in *February*, 1806, he shipped a quantity of goods to the defendants in *New-York*, and directed them to sell the same on commission, to pay themselves out of the proceeds, and to pay over the residue to his father, for the payment of his other creditors.

The shipment here spoken of, was not an assignment of *Bancker's* property, but a mercantile transaction. It has been decided in the Supreme Court of the *United States*, (3 *Cranck*, 91.) that to give the *United States* a preference under this act, the assignment must embrace all the property of the debtor, and the plaintiff can be in no better situation than the *United States*. This construction I think correct. How, then, can the plaintiff succeed, without showing the state of *Bancker's* property, and that the shipment to the defendants constituted the whole of it?

The attachment taken out does not bring the plaintiff's case within that part of the statute, because it was abandoned, and

never reached maturity. The proceeding was in a mere inceptive state, and no rights were acquired under it.

We are of opinion, that the defendants are entitled to judgment.

ALBANY.
August, 1808.

JACKSON
v.
HUDSON.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment for the defendants.

*JACKSON, *ex dem.* J. G. KLOCK and G. G. KLOCK [* 375]
and others, *against* HUDSON.

THIS was an action of *ejectment*, for lands in *Montgomery* county. The cause was tried at the *Montgomery* circuit, before Mr. Justice *Van Ness*, in *October*, 1807.

The plaintiff gave in evidence a lease from *George Klock*, the father of the lessors of the plaintiff, to *Jacob Forbush* and *Bartholomew Forbush*, dated the 6th *September*, 1783, for a farm, known by lots No. 7 and 8, on the *Mohawk* river, at *Conajohary*, "containing 600 acres of low and cribble bush lands," for the term of three years, at a yearly rent of 30 *skipples* of wheat, with clause of re-entry for the non-payment of the rent, &c.

The plaintiff then proved by *Peter P. Schuyler*, aged 60 years, that the lessees were in possession of the premises in question under that lease, and lived there about eight years after, and that they lived on the land a year or two previous to the lease, before which they said that the land belonged to the *Indians*, and was called *Indian* land; that they recognized no particular title when they entered, and that they considered the land as vacant: that the *Klocks* claimed the land, and threatened to turn them out; that the *Indians* had been in the exclusive possession of the *Conajohary Castle* tract (of which the premises in question are parcel) as long as the witness could remember, and so continued until they went to *Canada*, in the revolutionary war; that after the *Indians* had so departed, *John Peter Revershang*, who was married to an *Indian squaw*, claimed the whole tract, in right of his *wife; that *Jacob Forbush*, one of the lessors of the plaintiff, first took possession of another piece of land in the *Conajohary Castle* tract, and improved it for some time, when the *Indians* ousted him,

The possession of a tract of land by the native *Indians* does not affect the validity of a patent from the state, granting the land to white persons, without the consent of the *Indians*. The legality of such a patent is a political question, which cannot arise or be discussed in a suit between two of our own citizens. The possession of the native *Indians* is not such an adverse possession, as to render subsequent alienations by the patentees void, on the ground of *maintenance*. Where the defendant in *ejectment* sets up an outstanding

[* 376]
title, it must be a present, subsisting and operative title, otherwise, the presumption is

that such title in a stranger has been extinguished. An outstanding title, in certain *Indians* of the *Mohawk* tribe, was held to be extinguished, as the title had never been claimed or asserted, and the tribe or nation had become extinct.

Where a deed may enure several ways, the grantee shall have his election which way to take it. An exception in a deed shall be taken most favorably to the grantee, and if it be not set down or described with certainty the grantee shall have the benefit which may arise from such defect.

ALBANY,
August, 1808.
JACKSON
v.
HUDSON

and told him to go and take other lands; that *Forbush* then entered on part of the premises, and soon after took the lease above-mentioned; that no person claimed any adverse interest in the *Conajohary Castle* tract, during the possession thereof by the *Indians*; that *George Klock* lived about four miles from the said tract; that the *Conajohary Castle* tract was very valuable, and contained a great portion of low land: that the *Forbushes* admitted that they paid rent to *Klock* under the lease; that *Klock* claimed the whole *Conajohary Castle* tract, at the time of giving the lease, and died in 1789 or 1790; that the two lessors of the plaintiff named, pretended to claim the whole tract after *Klock's* death, and that the lessors of the plaintiff are his heirs at law.

The plaintiff having here rested his cause, the defendant gave in evidence:—

1. The letters patent, dated the 13th *November*, 1731, to *A. Van Horne*, *W. Provost* and *C. Livingston*, (three of the colony council,) and *Mary Burnet*, daughter of Governor *Burnet*, for 8,000 acres of land, including the *Conajohary Castle* tract.

2. A release and quitclaim, dated 22d *November*, 1763, from *P. Livingston*, *W. Livingston*, *G. Klock*, and three others, styling themselves part owners of the tract mentioned in the said letters patent, in consideration of five shillings, to three *Indians*, by name, in fee, of a tract of land described by metes and bounds, in trust for them, and all the rest of the native *Indians*, belonging to the *Conajohary Castle*, and their heirs.

3. Authentic copies of the map and field book of the partition of the patent, made the 9th *October*, 1764, by which the *Conajohary Castle* tract was set off into an allotment by itself, and the rest of the patent laid out into five allotments. The 1st, 2d, 3d and 4th allotments contained each about 800 acres, and were divided into eight lots *each, and the 5th allotment divided into four lots of 200 acres each. The *Conajohary Castle* tract formed the 6th allotment, and was laid out into four lots of 850 acres each, and is described in the field book as in the possession of the *Mohawk Indians* of the *Conajohary Castle*, by virtue of a deed to them in fee, executed by *Philip Livingston*, *William Livingston*, *Walter Rutherford* and *John Duncan*, being four of the six persons, who executed the release of 1773. The field book refers generally to the deed. No other proceedings relative to the partition were produced.

4. A release from *George Klock* to *Jellis Fonda*, dated the 27th *January*, 1767, for several parcels of land in the five first allotments, and a specific fourth part of lot No. 1, in the 6th allotment. This release refers to the partition, and the map and field book thereof.

5. A release from *George Klock* to *Johannes Luke*, in 1784, for the residue of lot No. 1, in the first allotment.

The defendant further proved, by *P. P. Schuyler*, that in 1790 or 1791, the two lessors of the plaintiff named, gave him

and the *Forbushes*, separate agreements, in writing, whereby they stipulated to give separate leases for 21 years, of their lands within the *Conajohary Castle* tract, whenever they, the said lessors of the plaintiff, should obtain a grant or confirmation for the same, from the state. These agreements were afterwards given up.

ALBANY,
August, 1808.
JACKSON
v.
HUDSON.

It was next proved, by *Christian Nellis*, that shortly after the death of *George Klock*, the two lessors of the plaintiff named, attempted to purchase of certain *Indians*, the lands within the *Conajohary Castle* tract, though informed that the *Indians*, with whom they were contracting, did not belong to the *Conajohary Castle*.

The defendant then read a paper writing, signed and sealed by the two lessors named, and *Michael Kirn*, relative to a part of the *Conajohary Castle* tract. It was dated the 28th September, 1790, and was a covenant with *Kirn*; that as soon as they, the *Klocks*, should obtain a *patent or confirmation for the lands leased by them of the *Indians* in *Conajohary Castle*, they would execute a lease of the same to *Kirn*, for 21 years, at a rent of 5*l.* a year.

[* 378]

Two other papers were read relative to other parts of the said tract, of a similar import, which were signed by the two lessors of the plaintiff named, the one dated the 29th September, 1790, and the other, the 10th January, 1791.

It was next proved, by *Christian Donstader*, who was 90 years of age, that he had known the *Conajohary Castle* from his youth; that the *Indians* always had the exclusive possession of the *Conajohary Castle* tract, until they went away in the revolutionary war; that several white persons, at different times, improved part of the tract under the *Indians*; that shortly after the *French* war, *George Klock* made a purchase of some *squaws* and *Indian* children, of a part of the *Conajohary Castle* tract, situated below the premises.

The defendant then gave in evidence a deed in fee, from the executors of *Jellis Fonda*. to him, for a part of the premises, dated the 9th May, 1792, and a deed from *C. P. Yates*, to him in fee, dated 2d January, 1792, for the residue of the premises, containing in the whole 102 acres.

Hendrick Frey testified, that the lands in the first five allotments were held according to the partition of 1764, and that he, in 1762 or 1763, by agreement between the *Conajohary Indians* and the proprietors under the said patent, ran a division between the *Conajohary Castle* tract and the residue of the patent, corresponding with that adopted in the partition of 1764, which was uniformly adhered to by all parties, until the *Indians* went away; that when the commissioners commenced the survey of the *Conajohary Castle* tract, they were opposed by the *Indians*.

The plaintiff then gave in evidence:—

ALBANY,
August, 1808.

JACKSON
v.
HUDSON.
[* 379]

1. A release from *Provost* to *P. Livingston*, dated the 7th November, 1734, for one quarter of the patent, for the consideration of 100*l*.

*2. The will of *P. Livingston*, dated the 15th July, 1748, by which he devised the estate in this patent to his eight children, in fee.

3. A deed from the devisees to *Jellis Fonda* and *George Klock*, dated 3d February, 1761, for the consideration of 2,400*l*. for one half of the said patent, excepting 1,000 acres before conveyed to *David Schuyler*.

4. A deed in fee, from *D. Van Horne* and *S. Van Horne*, the heirs of *A. Van Horne*, one of the patentees, to *Jellis Fonda* and *George Klock*, dated 3d February, 1761, for the consideration of 1,200*l*. for one fourth of the patent, excepting 500 acres before conveyed to *David Schuyler*.

It was admitted, that the premises were in lot No. 2, of the 6th allotment, as laid down in the map and field book, above-mentioned.

Wilhelmus Dillenback, aged 90 years, who was called on the part of the plaintiff, proved, that soon after the French war, he witnessed a deed executed by several *Indians* to *Jellis Fonda* and *George Klock*. The plaintiff's counsel refused to produce this deed, though it was called for, in pursuance of a notice to that purpose.

The jury, agreeably to the charge of the judge, gave a verdict for the plaintiff, for three eighths of the premises.

A motion was made, at the last February term, to set aside the verdict, as against law and evidence.

Cady and *Van Vechten*, for the defendant. The verdict in this case is for the undivided three eighth parts of the tract. If it can be shown that the plaintiff's right, if any, was divided, or that if he once had a title, he has parted with it, the verdict must be set aside. *George Klock* was not one of the original patentees, in 1731. If he had any title, it must have been under the conveyance in 1761. But, at that time, the *Indians* were in the actual and exclusive possession of the tract. The testimony of *Schuyler* fully proves, that they had the adverse and exclusive possession of the land. It was not a temporary *possession, for the sake of hunting or the chase, but a permanent possession for the purposes of agriculture; they made leases and received rent. The deed, therefore, of 1761, was void, for a person out of possession cannot convey a valid title. (1 *Johns*. 159.) The release in 1763, from *Livingston*, *George Klock*, and others, to three *Indians* only, could not give a title; and if it did, then *Klock* had parted with the title he held.

The conduct of the lessors of the plaintiff, from 1761 to the commencement of the present action, has been in direct hostility to the title now set up. For though *Klock* pretended to

hold the whole tract under the deed, yet, after the *French* war, he purchased of some of the *Indians*.

In 1790, or 1791, two of the lessors of the plaintiff, sons of *George Klock*, agreed with *M. Kirn*, to give him a lease as soon as they obtained a grant or confirmation of their title from the state. If they had a title, by descent or purchase, why should they desire a grant from the state? So impressed were they with the defect of their title, that they endeavored to obtain deeds from any of the *Indians* who could be induced to execute a conveyance.

J. and B. Forbush never took possession under the title of 1761. They first entered into possession under the *Indians*; and, by their direction, left their first possession, and went to another part of the tract, thereby recognizing the *Indian* title. They afterwards took a lease from *Klock*; but it is evident, that this was done merely to protect themselves from being again dispossessed by the *Indians*, and was, in fact, collusive. All the acts of *Fonda* and *Klock* are not only in disaffirmance of the title under which the plaintiff claims, but show that they uniformly claimed to hold under the *Indians*. They not only recognized the *Indian* title; but the *Indians* themselves asserted their right, by resisting the surveyors, who attempted to run the lines of the tract.

The deed of partition in 1764 states, that the *Indians* were in possession of the *Castle* tract, by virtue of a release *from *Livingston* and three others. Though *Klock* is not there named, it must be presumed, that he had released to *Livingston*, and it is admitted, that a release from *Fonda* was to be presumed. This presumption is confirmed by the concurrent acts of *Klock* himself, and is strongly fortified by his long silence and acquiescence; for living within three or four miles of the premises, he quietly permitted strangers to retain possession. He exercised no act of ownership until 1783, when he merely gave a lease for three years, and with covenants for quiet enjoyment, which lease was manifestly collusive and fraudulent.

This possession has been uninterrupted and undisturbed from 1763 to the present time. Courts, in many cases, have gone far in supporting the presumption arising from a long and undisturbed possession, or long recognition of right under a deed. (12 Co. 5. *Bedell's case*. *Cowper*, 216, 217. 597. 2 *W. Black*. 1223. 2 *Caines*, 169. 382. 1 *Caines*, 84.) It is true, that the doctrine of presumption admits, that it may be rebutted by evidence to the contrary. But here no such evidence appears.

Again, it appears that the representatives of *P. Livingston* conveyed one half of the tract, excepting 1,000 acres before conveyed to *David Schuyler*. And then, the heirs of *Van Horne* conveyed a fourth part, excepting 500 acres conveyed to *Schuyler*.

ALBANY
August, 1808.

JACKSON
V.
HUDSON.

{ * 381 }

ALBANY,
August, 1808.

JACKSON
v.
HUDSON.

Now, how does it appear that the deed under which the plaintiff claims covers the residue, after deducting the two parcels belonging to *Schuyler*? Until these excepted parcels are first located, the deed cannot operate, or the land intended to be conveyed by it, be located. The plaintiff claiming under the indenture ought to have produced the map to which it refers.

That there was a partition in 1764, is manifest, from the evidence, and the deed from *Klock* to *Fonda*, in 1767, refers to and recognizes the partition. If *Klock*, then, had any title, it was in severalty, and ought to have been deduced under the deed of partition. An undivided three eighths could not be recovered.

[* 382]

**Hildreth*, contra. *Klock* was in full possession from 1783 to 1789, when he died; any right of entry, which the defendant had, was, therefore, tolled, supposing *Klock* to be a mere disseisor. It is said, that the deed of 1761, to *Klock* and *Fonda*, was void, on account of the adverse possession of the *Indians*. But they were also in possession in 1731, when the letters patent were issued, and can it be admitted that such a possession, by the native *Indians*, is to defeat a patent issued by the government?

The wandering and unsettled life of the *Indians* is wholly inconsistent with the idea of a permanent and adverse possession. The manner in which they occupied the land cannot produce that kind of adverse possession which is intended by the common law, and which the statute relative to *maintenance* had in view. The plaintiffs have produced sufficient evidence of a possessory title to maintain the action. It is true, that if the defendant can show a subsisting title out of the lessors of the plaintiff, they cannot recover; but this must be an actually subsisting title, connected with a possession within 20 years. (*Buller's N. P.* 110.) Merely to show that there has been a title once existing in some other person, is not sufficient. But the lessors of the plaintiff have produced a regular paper title, sufficient to enable them to recover. If *Fonda* and *Klock* were tenants in common, the entry of one is the entry of both, and such entry will be according to the title. *Klock* had a right to locate the parcels conveyed to *D. Schuyler* as he pleased, since there was no specific location mentioned in the exception of them in the deeds. It is objected, that there was no act of ownership from 1763 to 1783; but it is well known that the *Indians* were powerful, and it would have been the greatest rashness and folly for *Klock* to attempt to assert his rights against them. After the *Indians* had gone, and peace was restored, he entered and took possession, and remained in possession until his death.

[* 383]

**KENT*, Ch. J., delivered the opinion of the court. The
290

lessors of the plaintiff have made out the following paper title to the premises :

ALBANY
August, 1808.

JACKSON
V.
HUNSON

1. A patent from government, in the year 1731, for 8,000 acres of land, and which included the *Conajohary Castle* tract, of which the premises in question are a part.

2. A release from one of the four patentees, in the year 1734, to *Philip Livingston*, another of the patentees, for his one fourth part of the tract. This release invested *Livingston* with a moiety of the lands.

3. The will of *Livingston*, in the year 1748, by which he devised his estate in the patent, to his eight children, in fee.

4. A deed from the devisees, in the year 1761, to *Jellis Fonda* and *George Klock*, for a moiety of the same patent, excepting 1,000 acres before conveyed to *David Schuyler*.

5. A deed from the heirs of *Van Horne*, another of the patentees, in the same year, (1761,) to *Fonda* and *Klock*, for a fourth part of the patent, excepting 500 acres before conveyed to *David Schuyler*.

These several conveyances invested *George Klock*, the father of the lessors of the plaintiff, with the title to an undivided fourth part and an undivided eighth part of lot No. 2, in the *Conajohary Castle* tract, (being the premises in dispute,) provided the portions of land previously conveyed to *Schuyler* are located in some other part of the tract, and the fourth and the eighth parts amount to three eighths of the premises, or the quantity of land recovered by the verdict. The lessors of the plaintiff were proved to be the heirs at law of *Klock*; and this title, so deduced, is *prima facie* evidence of a good title to the premises, to the extent of the recovery. We are next to examine the several objections which the defendant has raised to its validity.

He has not set up any title in himself under the patent, except it be a deed from the executors of *Fonda*, *in the year 1792, for a part of the premises, and a deed from *C. P. Yates*, in the same year, for the residue of the premises. These deeds were given only seven years before the commencement of the present suit. The deed from *Yates* conveyed no title, because there is no evidence that he had any title, or that he was ever in possession; and the deed from the executors of *Fonda* (admitting that they were authorized to convey) could have operated only on the undivided share of their testator in the lot in question, as the release from *Klock* to *Fonda*, in the year 1767, was for another part of the castle tract.

[* 334]

The first objection raised to the plaintiff's title is, that the *Mohawk Indians* of the *Conajohary Castle* were in possession of the premises, as well as of the whole *Conajohary Castle* tract, in the year 1761, and possessed it as their own, and, consequently, that here was an adverse possession, which rendered the deed of 1761 inoperative.

ALBANY,
August, 1808.

M'LEAN
V.
RANKIN.

his father, informing him of the shipment, and that the property was intended for the payment of his debts in *New York*.

The defendants received and sold the property, the proceeds of which, after deducting the debt due to the defendants, and their commissions, exceeded the debt due to the plaintiff, for the money paid at the custom-house, on account of *Bancker*.

Bancker was understood by his creditors in *New-York*, to be insolvent, but the precise time when he became so did not appear.

After the property was received by the defendants, an attachment was taken out against *Bancker*, by one of his creditors, under the act giving relief against absconding and absent debtors; but the attachment was withdrawn, in consequence of an agreement made the 7th *April*, 1806, between the creditors and the defendants, that the latter should sell the property, and distribute the proceeds among the creditors of *Bancker*. The property was accordingly sold, and the proceeds are still in the hands of the defendants.

[* 371]

*The father of *Bancker* has never claimed the property; nor did it appear that *Bancker* had consented to the arrangement between his creditors and the defendants. An objection was made, at the trial, that the evidence of these facts did not support the plaintiff's declaration, and the question being reserved by the judge, a verdict was taken for the plaintiff, for 973 dollars, subject to the opinion of the court on the question, whether the plaintiff was entitled to recover.

Sanford, for the plaintiff. The question is, whether the plaintiff, under the act of Congress to regulate the collection of duties on imports and tonnage, is entitled to a preference to the other creditors of *Bancker*. To entitle the *United States*, and of course the plaintiff, to a preference, the debtor must be insolvent, and make a voluntary assignment of his property, or an attachment must have issued against *Bancker*, as an absent or absconding debtor.

It is stated as a fact, that *Bancker* was insolvent; but the time of his insolvency is not proved. Though he did not execute a formal assignment under his hand and seal, yet it was a voluntary transfer and delivery of this property to the defendants, expressly for the benefit of all his creditors. The goods came into the hands of the defendants by consignment, and the proceeds are held by them under the directions of *Bancker*, for the benefit of his creditors, which is tantamount to an assignment.

Again, the property was attached by a regular process of attachment, taken out against absconding and absent debtors, which is one of the cases in which the *United States* are entitled to a preference. That the attachment was afterwards

withdrawn, cannot vary the right of the *United States*, which attached the moment the process issued.

ALBANY,
August, 1808

M'LEAN
V.
RANKIN.

[* 372]

Wells, contra. The preference given by the act of Congress, is in derogation of the equal rights of creditors, and of the general policy of the law, in regard to the distribution of the estates of bankrupt and insolvent debtors; the party *who claims the preference, ought to be held to strict proof of his right. The period when *Bancker* became insolvent is not shown. It does not appear that he was insolvent when the goods were shipped, or when they came into the hands of the defendants; and even if he were insolvent, mere insolvency does not entitle the *United States* to a preference. There must be either a voluntary assignment by the debtor, an attachment of his property as an absent or absconding debtor, for the benefit of all his creditors, or bankruptcy. The insolvent must do some act, making a disposition of his entire property, before the right of the *United States* to a preference can attach; but there is no evidence whatever of such an assignment.

It was a mere shipment of goods in the ordinary course of business, with directions to pay certain debts. The assignment, intended by the act, is a regular assignment of all his property, by the debtor, expressly and avowedly for the benefit of all his creditors.

It does not appear that the defendants were to pay over, or distribute the proceeds of the goods, among all the creditors, *pari passu*, nor that these creditors acquired any legal or equitable right by the act of consignment which they could enforce against the defendants.

An attachment, it is true, was issued, but it was withdrawn before any proceedings took place under it, and it must now be considered, in every legal view, as never having existed. To make out a case of attachment, in which the law of the *United States* is to operate, it should be shown that it was prosecuted to effect, and that trustees of the estate of the debtor were appointed, pursuant to the act of the legislature of this state. Until the property became vested in trustees or assignees under the act, the right of preference could not attach. The voluntary arrangement between the creditors and the defendants, without the knowledge or assent of *Bancker*, to distribute the proceeds among all the creditors, cannot vary the case.

*In the case of *The United States v. Hooe and others*, (3 *Cranch*, 73—91.) the Supreme Court of the *United States* decided, that the *United States* had *no lien*, in a case of a voluntary assignment, unless it was an assignment of *all* the property of the debtor.

[* 373]

Baldwin, in reply. The fact of insolvency is stated, and

ALBANY,
August, 1808
JACKSON
v.
MYERS.

a subsisting one, since the *Mohawk Indians* of the *Conajohary Castle* have long since disappeared from the face of the country. *Etiam perire ruinae.*

Another objection to the plaintiff's title, is deduced from the exception in the deeds of 1761, of the 1000 and of the 500 acres, previously conveyed to *Schuyler*. In what part of the tract, covered by the patent, these two portions of land had been previously located, does not appear. There was land sufficient to supply them, without touching any part of the premises; and as the deeds were not explicit, *Klock*, the grantee, was left at liberty to locate these excepted tracts, in whatever part of the patent he pleased, as against every other person but *Schuyler*. Where a deed may enure in different ways, the grantee shall have his election which way to take it. An exception in a deed is always to be taken most favorably for the grantee; and if it be not set down and described with certainty, the grantee shall have the benefit of the defect.

388]

There is, then, no weight in this objection, and upon a full consideration of the case, the court are of opinion, that the motion, on the part of the defendant, for a new trial, must be denied.

SPENCER, J., having been formerly concerned as counsel in the cause, declined giving an opinion.

Rule refused.

JACKSON, *ex dem.* LUDLOW and others, *against*
MYERS.

A writing in the form of articles of agreement, and containing a covenant to convey lands, and concluding with a penalty for the non-performance of the covenant, though it contained words of bargain and sale, or an absolute conveyance *in presenti*, to one of the parties and his heirs, was held to amount to no more than an agreement to convey. The intent of the parties, which is apparent, and not repugnant to any rule of law, will control the technical words used in an instrument. (C)

A bargain and sale of land to A., "to hold the same to A. in trust for B. and C., their respective heirs and assigns for ever, in fee simple," creates only a life estate in A., and at his death, the legal estate reverts to the heirs of the grantor; and B. and C. can only resort to a court of equity to enforce the trust. A use in a bargain and sale can be limited only to the bargainee, who cannot be seised to any other use than his own. (b) When the plaintiff in ejectment claims to recover on the ground of prior possession, the possession must be clearly and unequivocally proved. The payment of taxes, and the execution of partition deeds, are not evidence of an actual possession, though they may show a claim of title.

(a) *Ives v. Ives*, 13 Johns. 235. *Jackson v. Blodget*, 16 Johns. 172. *Whallon v. Kauffman*, 19 Johns. 97. *Moore v. Jackson*, 4 Wend. Rep. 58. *Jackson v. Troup*, 16 Johns. 172. See *Jackson v. Greer*, post, page 424.

(b) *Jackson v. Cary*, 16 Johns. 302.

The plaintiffs proved that *William Ludlow* took possession of the premises in the spring of 1776, and remained thereon a year or two; that after he left the property, one *M'Dougle* went into possession of the premises, and continued thereon until the year 1780; that one *Lewis* was in possession after *M'Dougle*, who said that he held under the *Ludlows*; that in 1783, one *Chamberlain* was in possession, and after him, others; that in 1787, one *Joshua Carman* was in possession, who said, in 1793, that he held under the *Ludlows*. He remained in possession until the year 1794, when he surrendered it to the *Ludlows*. It was understood *by a witness, that *Chamberlain* held under the *Ludlows*, though *Chamberlain* did not say so. An agent for the *Ludlows* had the charge of the property, and in 1798, paid the arrears of taxes for several antecedent years, as such agent, and has paid them regularly since. After *Carman* left the place, the fences were removed, and the premises lay vacant and unenclosed, until one *French* took possession, about two years before the trial. One *Lawrence Van Kleeck* was in possession about 40 years before the trial, and so remained until his death, which was in 1770 or 1771. His eldest son, *Baltus*, succeeded to the possession on the death of his father, built a barn on the premises, and continued there until *William Ludlow* went into possession. *William Ludlow* died in 1784, and left *Carey* and *William W.*, (two of the lessors,) and *George* and *Gabriel W.* his sons and heirs. *George* died in 1797, without issue, and *Gabriel W.* died in February, 1805, leaving the three other lessors, his children and heirs. The defendant was in possession of a part of the premises under *Jane Van Kleeck*, about three or four years before the trial.

The plaintiff further proved a *partition*, in 1798, of the tract, under the statute, between *Gabriel Ludlow*, *William Ludlow* and *Carey Ludlow*, of the one part, and the heirs and devisees of *Leonard Van Kleeck*, of the other part, by which partition, 50 acres of one tract was set apart to the *Ludlows*, and the other moiety of it left undivided between them and the heirs of *Leonard Van Kleeck*. A lot containing 27 acres was also divided between the *Ludlows* and the heirs of *Van Kleeck*. In 1799, a further partition was made of the remaining moiety, between the *Ludlows* and the heirs of *Van Kleeck*, by which the former took three fifths.

The defendant read in evidence an agreement between *William Ludlow* and *Baltus Van Kleeck*, dated January 31, 1776, which was an agreement to let the place for one year, on paying the rent and taxes.

*The defendant further proved, that in 1774, the premises were in possession of *Baltus Van Kleeck*, who built a house thereon, and his son, *Lawrence Van Kleeck*, resided there until the winter of 1775 or 1776, and remained there a year, when he left the place; that *M'Dougle* went into possession after *Ludlow*; that *Chamberlain* was in possession about the year

ALBANY,
August, 1806.

JACKSON
V.
MYERS.

[* 389]

[* 390]

ALBANY,
August, 1808.

JACKSON
v.
MYERS.

1784 and 1785; that *Baltus Van Kleeck* died in 1784; and in the autumn of 1785, his executors sold the premises at auction, which were purchased by *Joshua Carman*, who went into possession, claiming the property as his own, and continued to reside there until 1794, when a hurricane blew down the house; that *Carman* said he owed the *Ludlows* a large sum of money, and that they released the debt, in consideration of his giving up the possession to them; that *Lawrence Van Kleeck* was the possessor and reputed owner at least 46 years before the trial, and when he died, in 1771, his son *Baltus* succeeded to the possession, and built a house, in which his son *Lawrence* resided until his death, in 1776; that *Baltus* was within the enemy's lines during the *American* war; that *M'Dougles* was in possession in 1777, and said that he was put into possession by the commissioners of sequestration; that one *Wood* succeeded *M'Dougles*, and *Chamberlain* succeeded *Wood*; that *Chamberlain*, while in possession, said that he paid rent to *John Van Kleeck*, one of the executors of *Baltus Van Kleeck*. *John Van Kleeck* was also an executor of *Leonard Van Kleeck*.

The plaintiff then proved, that in September, 1794, a complaint was made in behalf of *Jane Van Kleeck* and *George Ludlow*, against *Joshua Carman*, under the statute against forcible entries and detainers; that he was indicted, and traversed the indictment; but before the trial, a settlement took place, and the plea was withdrawn, and the indictment confessed; that on the 12th of March, 1799, *Baltus Van Kleeck*, the original owner of the premises, wrote a letter to *Joshua Carman*, his son-in-law, stating that his house was sold at *Poughkeepsie*, to *George Ludlow*, for his father and his brother *Gabriel*, for 1,700*l.*, and that he *must let Mr. *Ludlow* go in as soon as he could; that on the 12th of March, 1799, *Baltus Van Kleeck* and *George Ludlow* entered into articles of agreement under their hands and seals, in which *Baltus*, for the consideration therein-after mentioned, granted, bargained, sold and conveyed the premises to *George Ludlow*, to hold in trust for *William* and *Gabriel Ludlow*, their heirs and assigns for ever; and *Baltus* covenanted to make a good and sufficient deed by the first day of May following; in consideration whereof, *George Ludlow* covenanted, that he and *William Ludlow*, or one of them, would assign bonds given by persons in the county of *Dutchess* and *Allany*, (including *Baltus Van Kleeck's* bond to *William Ludlow*,) to the amount of 1,700*l.*, and the parties mutually agreed to secure the said lands and bonds, to be severally conveyed and assigned, against all confiscations, &c. *Baltus Van Kleeck* agreed also, that the bonds to be taken by him in part payment, were a bond from *Baltus Van Kleeck* to *William Ludlow*, a bond from *C. Seabury* to *George Ludlow*, a bond from *E. Bogardus* to *George* and *William Ludlow*; and that if the two last bonds proved bad, or the whole should fall short of the consideration-money, the same should be made good. h

assigning other bonds, &c. For the true performance of the grants and covenants, each party bound himself to the other in the penal sum of 500*l*.

ALBANY,
August, 1808

JACKSON
v.
MYERS

The plaintiff also produced in evidence the will of *George Ludlow*, dated the 17th of *May*, 1797, by which he devised all his estate in fee to his brother *William W.*, one of the lessors; and also the will of *William Ludlow*, dated the 19th of *April*, 1783, by which he empowered his executors to sell all his estate in fee; a conveyance from the executors of *William Ludlow* to *Charles Ludlow*, one of the lessors, dated the 6th of *July*, 1795, for the consideration of 563*l*. 2*s*. for parts of the lots; a conveyance from *Charles Ludlow* to *Gabriel W. Ludlow*, *Carey Ludlow* and *William W. Ludlow*, dated the 6th of *October*, 1797.

*The jury found a verdict for the plaintiff.

[* 392]

A motion was made to set aside the verdict, and for a new trial.

J. Tallmadge and *Emott*, for the defendant. From the different persons put into possession of the premises, by the commissioners of sequestration, it is manifest, that the title of *Van Kleeck* was recognized by them, and rent was paid to his executors.

The defendant, being in possession, was not bound to prove a title, but he has shown an outstanding title; that *Lawrence Van Kleeck* died seised, and left the premises to his son *Baltus*. The plaintiff, having failed to make out a possessory title, has attempted to show a paper title; but the instrument executed in 1779, between *Baltus Van Kleeck* and *George Ludlow*, and set up by the lessors, was a mere agreement or covenant to convey, and not an actual conveyance. In construing deeds or instruments, the intent of the parties is more to be regarded than the words. (4 *Bac. Ab.* 160—164. *Leases*, K. *Noy*, 128. 1 *Term Rep.* 735. 2 *Term Rep.* 739. 1 *Bro. Ch. Rep.* 397. 5 *Term*, 163. *Shep. Touch.* 84. 3 *Atk.* 136. 1 *Lev.* 55. 1 *Sid.* 82. 1 *Keble*, 160. 225. 274. *Shep. Touch.* 514. *Plowd.* 160. b. 6 *East*, 530.) Thus, where the most proper and authentic words to describe a present lease for years, are made use of, yet if, upon the whole deed, there appears no such intent, but that the writing was merely preparatory and relative to a future lease to be made, the law will disregard the words, and construe the instrument according to the manifest intent of the parties. But should this be regarded as a deed or personal conveyance, what would be its operation? If it has any operation at all, it can only be as a bargain and sale at common law. Since the statute of uses, the bargain is said to vest the use, and the statute the possession. But the use must vest in the bargainee before the statute can vest the possession. (2 *Wooddeson*, 246. *Cro. Jac.* 696.) To raise a use, there must be a valuable consideration in money. Nor

ALBANY,
August, 1808.

JACKSON
V.
MYERS.

[* 393]

can a use be executed upon a use. (*Saunders*, 316. 1 *Lco.* 113 2 *Black. Com.* 335. *Gillb.* 194.) The statute cannot have a double operation. On a bargain and sale, no use can be de lared but what the law creates ; (1 *Co.* 176, 177. *Bac. Ab.* 57. *Uses*, E.) and the use vests only in the person who gives the consideration ; (*Saund.* 313—315. *Shep. Touch.* 509 510. *Littleton*, sec. 60. *Co. Litt.* 49. a.) and the bargainee is seised only to his own use, and not to the use of another. Again, a *bargain and sale to a person generally, creates only an estate for life ; for since the statute has transferred the possession to the use, uses are governed by the rules of common law, and no fee simple can be created, without the word *heirs.* (1 *Co.* 100. 1 *And.* 35. 3 *Keble*, 317. 8 *Co. Rep.* 94. a. 1 *Co.* 87. *T. Raym.* 237. *Saunders*, 115. *Vaugh.* 49.)

But admitting that there are words which, if taken by themselves, would amount to a bargain and sale, yet if the whole instrument is taken together, and the intention is regarded, it is clear that this is a mere agreement for a conveyance. In 1779, the uniform mode of conveying a fee was by lease and release. The words, "articles of agreement," clearly show that no present conveyance was intended.

Harison and *J. Radcliff*, contra. The words of the deed clearly import a conveyance *in presenti*, and a covenant for further assurance, which is usually inserted in deeds. The consideration was sufficient. The bonds and mortgages may be regarded as money ; they were in the power of the *Ludlows*, and it is not essential that the consideration should move from the person to whom the sale is made. A covenant to pay the consideration-money at a future day, is sufficient. (*Dyer*, 337. a.) It is true, that the legal use can arise only to the bargainee ; but there is a limitation to the use of the bargainee, for the words, "their respective heirs," may apply as well to the bargainee as to the *cestui que trusts*.

At least, here is an agreement to convey the land to the lessors of the plaintiff, which, it is admitted, gave them an equitable title, under which possession was taken, and has been kept up for near 30 years. After a lapse of 30 years, a conveyance may be presumed to have been made pursuant to that agreement. As against trespassers and intruders, every presumption ought to be made in favor of the lessors.

[* 394]

Again, as the lessors entered under *Van Kleeck*, the real owner, their possession ought to be coupled with the title of *Van Kleeck*, and be protected by it against mere wrongdoers. It is not necessary for the plaintiff to show *an uninterrupted actual possession of the land. It is enough that the lessors have exercised acts of ownership, and have invariably claimed and asserted their right. There has been, in fact, a possession in the lessors and by those under whom they claim, from 1779, until about two years before the trial of the cause. *Car* 298

man was the only person, except the *Ludlows*, who claimed to hold under *Van Kleeck*, and he relinquished to them all his claim, so that they became entitled to the whole right of possession which belonged to *Baltus Van Kleeck*. In the case of *Jackson, ex dem. Murray & Bowen, v. Hazen*, (2 Johns. 22.) it was decided, that a peaceable possession for three years was sufficient to enable the plaintiff to recover in ejectment, against one who entered without any color of right. A mere trespasser or intruder ought not to compel a person who claims title to prove a regular title. A possession is enough, *prima facie*, to entitle the plaintiff to recover in ejectment. (2 Lil. Ab. 128. 2 Saund. 112.) A priority of possession in the plaintiff will prevail against a defendant who shows no title.

ALBANY.
August, 1808.
JACKSON
v.
MYERS.

KENT, Ch. J., delivered the opinion of the court. The lessors of the plaintiff must recover in this case, either on the strength of the deed of the 12th of *March*, 1779, or of their possession of the premises prior to the entry of the defendant. They have shown no title but what is to be deduced from one or other of these sources.

1. The deed produced does not appear to be sufficient to give them the title in question. Considering it in all its parts, it is to be taken as a mere article of agreement, and not a conveyance of an estate. It purports, by its formal commencement, to be only articles of agreement, and it concludes by binding the parties to each other, in a penalty for the performance of the grants and covenants in the deed. It is well understood, that as early as the year 1779, the form of conveyance in this state was by lease and release, and that this had been the universal practice during the colonial government, a practice which continued until the abolition of the *British* statutes, in the year 1788. It was the generally received opinion at that day, that a bargain and sale required enrolment, and this usage and opinion (whether correct or not, is perfectly immaterial) is a strong *indicium* of the understanding of the parties to this deed, that no estate was intended to be conveyed. There was no consideration paid or acknowledged, but only an agreement that bonds should thereafter be assigned, and there was a mutual covenant to secure the lands and bonds "to be conveyed and assigned" from forfeiture and confiscation. After this, who can doubt of the intent? The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect. The rule as to leases, according to Lord Chief Baron *Gilbert*, (*Bacon*, tit. *Leases*, &c.) is, that though the most proper form of words be used to describe and pass a present lease for years, yet, if upon the whole deed

[* 395]

ALBANY,
August, 1808

JACKSON
v.
MYERS.



[* 396]

there appears no such intent, and that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the manifest intent. The case of *Sturgeson v. Dorothy* (*Noy*, 128.) is directly to this point. There was in that case an article of agreement to lease a place for 50 years, and the words were in the present tense, and with the form of an immediate demise; but as the intent from another part of the same paper appeared to be, that the agreement should only be executory, the court ruled that it was not a lease, but only an agreement for a lease. The like decision was made in the modern cases of *Goodtitle v. Way*, and of *Doe v. Clare*; (1 *Term*, 735. 2 *Term*, 739.) and in one of those cases, the decision in *Noy* was recognized as law. The same rule of construction has been applied to cases where a life estate was in question. It was determined in *Doe v. Smith*, (6 *East*, 530.) that where the *whole instrument imported that something ulterior to the agreement was to be done by way of a regular lease, it showed the intent to be, notwithstanding the words of the demise appeared to be *in presenti*, that the writing was only to operate as an agreement for a lease, and not as the lease itself. But the case of *Foster v. Foster* (1 *Lev.* 55. 1 *Sid.* 82.) is much more analogous than any which has been mentioned. The deed in that case respected an estate in fee, and began with the like form of commencement as the deed in the present case, and used the like words denoting an immediate conveyance; but the court held, that the articles did not raise any use, but rested only in covenant; that it was only an agreement preparatory to a further assurance, and that no fee passed.

These cases sufficiently establish the rule of construction, that though a deed may in one part use the formal and apt words of conveyance, yet if, from other parts of the instrument taken and compared together, it appears that a mere agreement for a conveyance was all that was intended, the intent shall prevail.

If, however, we were to give this article of agreement the force and effect of a technical bargain and sale, it is evident that only a life estate was conveyed to *George Ludlow*; and that the *cestui que trusts*, if they had any remedy, after the death of *Ludlow*, to enforce the trust, were under the necessity of resorting to a court of equity to obtain it. The legal estate reverted back to the heirs of *Baltus Van Kleeck*. The reversion in fee was clearly in the bargainor, for want of words of inheritance. Whenever the use limited by a deed expires or cannot vest, it returns back to him who raised it, and a use upon a bargain and sale cannot be limited to any other person than the bargainee. He cannot be seised of the land to any other use than his own. The trust created in this case was exclusively within the cognizance of the Court of Chancery.

It is, therefore, a most obvious conclusion, that the paper title set up by the lessors must fall to the ground.

*2. The next point in the case is, whether the lessors made out a title by possession.

It appears that *Baltus Van Kleeck* was the original owner of the premises. He acquired a title by descent cast from his father *Lawrence*, and he was in the peaceable possession at the commencement of the *American* war. The legal title must still reside in his heirs, except so far as it may be deemed to be lost or weakened by the possession of the *Ludlow* family. After a careful examination of the facts, I cannot perceive that the lessors of the plaintiff have made out a right of possession. *William Ludlow* entered in the year 1776, as a tenant under *Baltus Van Kleeck*, and he remained there for a year, and then left the premises. *M'Douglass* succeeded him, and said that he was put in possession by the commissioners of sequestration. Here was still a possession continued under the title of *Van Kleeck*, by public officers, assuming the possession as belonging to *Van Kleeck*, who had withdrawn within the *British* lines. *M'Douglass* was succeeded by *Lewis* or *Wood*, and he by *Chamberlain*, who was in possession in 1784 and 1785, and paid rent to one of the executors of *Baltus Van Kleeck*. In 1785, the executors of *Baltus* sold the premises at auction, and *Carman* purchased and took possession under that title, and held the premises until the year 1794, when we first hear of any recognition of a title in the *Ludlow* family, and it is from that time only that any title by possession can be deduced. The fact mentioned by one of the witnesses for the plaintiffs, that *Lewis*, who was in possession after *M'Douglass*, said that he held under the *Ludlows*, cannot have much weight. It is probable there must have been some mistake on this point, as the possession and title of *Van Kleeck* seem afterwards to have been regularly continued down and acknowledged until the controversy which took place with *Carman*, in 1794. The possession of the *Ludlows* since the year 1794 was equivocal, and not sufficient to support any title founded upon possession alone. About the time that *Carman* acknowledged their title, he quitted the possession, and from that time until the entry of the defendant, the premises were left vacant and unenclosed. The payment of taxes, and the partitions made by the *Ludlow* family, were not evidence of actual possession, though they may have been of a claim of title. The lessors of the plaintiff, therefore, failed to support a right founded on possession, and the defendant showed an outstanding title in the legal representatives of *Baltus Van Kleeck*.

The court are, accordingly, of opinion, that the verdict was against evidence, and ought to be set aside.

VAN NESS, J., having been formerly concerned as counsel, gave no opinion.

ALBANY.
August, 1808.

JACKSON

v.

MYERS.

[* 397]

[* 398]

ALBANY,
August, 1808.

BAILEY and
BOGERT
v.
OGDENS.

THOMPSON, J., not having heard the argument gave no opinion.

Rule granted. (a)

(a) A new trial was also granted in the case of *Jackson, ex dem. Ludlow and others, v. French*, depending on the same questions.

[* 399] *BAILEY and BOGERT *against* OGDEN and OGDEN.

An entry made by the vendor of goods, in his book of sales, of the name of the purchaser, and the terms of the contract of sale, which was read to the agent of the vendee, who made the purchase, and assented to by him as correct, was held not to be a sufficient memorandum in writing, within the statute of frauds, it not

[* 400]

being signed by the party to be charged, or by his agent.

Whether the vendor is bound by such a memorandum, so that the vendee could enforce the contract against him? *quere.*

The form of the memorandum

of the bargain is not material, but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without having recourse to *parol* proof.

An actual delivery of goods, or of a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances which ought to be held tantamount to an actual delivery, ought, however, to be so strong and unequivocal, as to leave no doubt of the intent of the parties. An agreement with the vendor about the storage of the goods, and the delivery by him of the export entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *inducium* of ownership. (a)

Where the vendor of goods on a credit, required notes of the vendee with approved endorsers, which was agreed to by the agent of the vendee, as one of the terms of the contract of sale, it *seems*, that the contract of sale is not complete, until the principal, or vendee himself, has assented to the giving of endorsed notes, and the endorsers have been named and approved.

Whether an agent, who is authorized to purchase goods at a certain price, upon a certain credit, can stipulate, so as to bind his principal, to give endorsed notes or security? *quere.*

An agent or broker, authorized to purchase goods on certain terms, is a competent witness, in a suit between the vendor and the vendee, though he has exceeded his authority.

(a) *Outwater v. Dodge*. 6 Wend. 597.

at some sugar, with a view to purchase it for the defendants; that on the 13th or 14th of *December*, 1804, (and he rather thought it was the 13th,) *Huguet* called again, and after some conversation with the plaintiffs, finally and absolutely purchased 160 boxes of white and 190 boxes of brown sugar, which had been imported from the *Havanna*, in the schooner *Mary Ann*, and arrived in *New-York* the 6th of *November*, 1804; and also 14 boxes and 1 hogshead of brown sugar, and 24 boxes of white sugar, which had been imported in the sloop *Caroline*, on the 29th of *October*, 1804; that the prices and terms were agreed on; that he agreed to give the defendants' notes endorsed at 60 and 90 days, but that the debentures on the sugars were to be received in part payment; that *Huguet* requested that the sugars might remain in the store, and that he would pay storage for them; and it was agreed that the sugars should remain, and that the storage should commence after the expiration of the current month. The price of storage was fixed at 2 shillings per box; the month's storage for the sugars imported in the *Mary Ann*, ended on the 8th of *January*, and for those imported in the *Caroline*, on the 30th of *December*.

An entry of the sale, and the terms, was made by one of the plaintiffs, in a memorandum book, and the entry read to *Huguet*, who said it was correct. *Huguet* then requested the plaintiffs to give him a minute of the import entries, to enable the defendants to make an export entry* of the sugars, in order to obtain the drawback; and one of the plaintiffs gave to *Huguet* such a minute. The memorandum book, together with the other books of the plaintiffs, and the sugars and store, were destroyed by fire, on the 18th of *December*, 1804. Two or three days after the fire, the witness, on being requested by the plaintiffs, made a memorandum relative to the sale, to the best of his recollection. He further stated, that it was a general practice with the plaintiffs, not to give bills of parcels for goods sold, until they were delivered, or until they received the money or notes for which they were sold; that *Huguet*, in the character of broker, had, before the above sale, purchased goods from the plaintiffs for the defendants; that the plaintiffs required endorsed notes, because the sum was large, and they were acting as factors for others, and the sugars were sold by them as agents or factors for foreign correspondents; that *Huguet* wanted the plaintiffs to take the notes without an endorser, but they refused.

The book-keeper of the plaintiffs, and another clerk, testified to the same facts.

The three witnesses said, that no mention was made, in any of the conversations between *Huguet* and the plaintiffs, whether the defendants were to be at liberty to remove the sugars, before the delivery of the notes; nor was there any conversation as to the person who was to be the endorser of them; nor

ALBANY.
August, 1808.

BAILEY and
BOGERT
v.
OGDENS.

[* 401]

ALBANY,
August, 1804.

BAILEY and
BOGERT
v.
OGDENS.

whether the sugars were sold according to the import weight or not.

Several merchants, who were called as witnesses, testified that it is a common practice, in dealing with respectable merchants, to deliver the goods before calling for the notes, whether they are to be endorsed or not, without previously inquiring who is to be the endorser; that it is not usual to stipulate for storage until the bargain is complete, and they never heard of an instance of the minute of the import entry of goods being delivered, until after the goods were sold.

[* 402]

*The plaintiffs, pursuant to a written notice, called on the defendants to produce two letters written by one of the defendants, the one dated the 11th of *December*, 1804, at *Philadelphia*, and directed to *Andrew B. Lyde*, in *New-York*, his clerk, and the other from the same to the same, dated the 13th of *December*, and also the minute of the import entry delivered, which were produced; and the deposition of the said *Lyde* was read, who stated, that for four years past he had lived with the defendants, as a clerk; that in *November*, 1804, the defendant *R. Ogden* left *New-York* for *Europe*, and on the 2d of *December*, 1804, the defendant *J. Ogden* left *New-York* for *Philadelphia*, having been previously, as the defendant *J. Ogden* said, in treaty with the plaintiffs, for the purchase of sugars; that he heard the defendant *J. Ogden* authorize *Huguet* to purchase the sugars at a limited price, at 12 dollars and 50 cents for the brown, and 16 dollars and 25 cents for the white sugars, on a credit of 60 and 90 days; that neither the deponent nor any other person had any discretionary authority from *J. Ogden* on the subject; that on the 12th of *December*, he received from *J. Ogden* a letter, in which he said, "In respect to the sugars of *Bailey & Bogert*, I think it is probable they will come to our price, say 12 dollars and 25 cents, and 16 dollars and 25 cents, at 60 and 90 days;" and on the 13th of *December*, he received another letter from *J. Ogden*, in which he said, "*Huguet* may now buy the sugars of *Bailey & Bogert*, if he can, on the terms they offered, say 12 dollars and 50 cents, and 16 dollars and 25 cents, at 60 and 90 days' credit;" that on the same day he showed the last letter to *Huguet*, and authorized him to make the purchase of the plaintiffs, on the terms therein specified; that on the same day, *Huguet* told him that the plaintiffs had agreed to let him have the sugars on the above terms, but demanded *endorsed* notes; that this condition occasioned some surprise to the deponent, and he told *Huguet* he had no authority to say that the defendants would give an endorser; that the deponent told *Huguet* that the defendant *J.*

[* 403]

**Ogden* would be in town in a day or two, and call on the plaintiffs; that all further negotiation was considered as at an end till his return, and he heard nothing further on the subject, until after the fire; that when the deponent shut up the counting house of the defendants, on the evening of the 17th

of December, *J. Ogden* had not yet returned from *Philadelphia*, nor did he hear of his arrival until the morning after the fire; that on the 20th of *March*, 1805, one of the plaintiffs called on *J. Ogden* for payment of the sugars, who denied the purchase; that the defendants have never, to his knowledge, been asked for, or given an endorser; that *Huguet* was usually employed by *J. Ogden*, in purchasing sugars and other goods, and had made frequent purchases for him before the above transaction; that it was the general practice for the defendants to give instructions to *Huguet* with respect to such purchases, and for *Huguet* to report, before the bargain was concluded.

Francis Huguet, who was sworn as a witness on the part of the defendants, said, that on the 14th of *December*, 1804, a clerk of the defendants requested him to buy the sugars on the terms mentioned in their letter; that he went to the plaintiffs, who offered them on those terms, with an approved endorser; that he replied that he did not believe that the defendants would object to satisfy them as to the endorser, but that was not his order, and that *J. Ogden* would be in town on *Monday*; that he wrote with his pencil, in his memorandum book, as follows:—

“ 14th December,
J. Ogden & Co.—*Bailey & Bogert*,
 “ Brown 12 1-2 } 60 and 90 days.
 “ White 16 1-4 }
 “ Debenture part pay.”

That the plaintiffs said they would not consent to sell the sugars, without an endorser; that on the next day, the plaintiffs read to him the memorandum which they had made the day before, thus:

*“ 14th December,

“ Sold *Huguet*, for *J. Ogden & Co.* notes with approved endorser, boxes white, do. brown *Havanna* sugars, at 12 1-2 for brown, and 16 1-4 for white, payable at 60 and 90 days; debenture we will receive in part payment.”

That he said to them it was right, but in respect to the endorser, he said, that *J. Ogden* will be in town on *Monday*, and you will fix it with him; that he went and told the clerk of the defendants that the plaintiffs demanded an endorser, who replied that he had no order about that, and it must be left to *J. Ogden*, on his return; that he saw *J. Ogden* the morning after the fire, who refused to give an endorser; that he made no memorandum or entry of it in his day-book, until he knew whether *J. Ogden* would accept of the terms, but merely kept the memorandum with a pencil in his memorandum book: that he made no agreement about storage, nor said any thing about removing the sugars; that he did not consider the

ALBANY.
 August, 1808.
 BAILEY and
 BOGERT
 v.
 OGDENS.

[* 404]

ALBANY,
August, 1808.

BAILEY and
BOGERT
v.
OGDEN.

bargain concluded, if *J. Ogden* did not agree to give an endorser.

The defendants further proved the delivery to them by the plaintiffs, on the 25th of *December*, 1804, of a bill of parcels of the sugars, and that the latter, on the 29th of *December*, demanded notes, without an endorser.

The judge charged the jury, that if *Huguet* acted under the authority of the defendant's letter of the 13th of *December*, he was clothed with discretionary powers, as to the security to be given, and the defendants were bound by his stipulation to give an approved endorser, provided such stipulation was made by him; that his authority, by virtue of that letter, extended to an acceptance of the delivery of the goods; that a note or memorandum, to satisfy the statute of frauds, must contain the names of the parties, and the terms of the contract, and that if the names of the parties be inserted at the top, in the middle, or at the bottom, by their authority, it is sufficient; that here being but one special count upon the contract, and *that count averring a delivery, the averment must be proved, even if there had been a note or memorandum within the statute; that the right to recover depended on the fact, whether there was a consummated bargain, and a delivery and acceptance of the goods, so as to change the property: that the delivery and acceptance need not be actual, but may arise by construction from the acts and declarations of the parties; and it was submitted to the jury, whether the declarations and acts of the parties amounted to a waiver by the plaintiffs, of the weighing of the goods, and a delivery of the notes, as precedent to the transfer, and an acceptance of the goods by *Huguet*, as the property of the defendants; if they did, that they ought to find for the plaintiffs; but, otherwise, for the defendants.

The jury found a verdict for the defendants, and a motion was made, at a former term, to set it aside, and for a new trial.

C. I. Bogert, for the plaintiffs. 1. The first question is, whether *Huguet*, the broker, was authorized to make the bargain which he concluded with the plaintiffs. A special agent must, no doubt, act within the scope of his authority; and the point of inquiry is, What was the extent and scope of the authority of the agent in this case? Where a person is authorized to do a certain thing, he is clothed with all the powers, relative to the object of his agency, that may be necessary to attain it. If an agent is directed to purchase a particular piece of land, he cannot buy another piece; but if he obtain the piece he was sent to purchase, the principal will be bound for the price. If he be limited as to the price, and he exceed it, yet his principal will be answerable for the excess of price, if the par

icular instructions of the agent were not made known to the vendor, who has nothing to do with the terms prescribed by the principal. (*Fenn v. Harrison*, 3 Term Rep. 757. 4 Term Rep. 177. 1 *Pothier on Obligations*, by Evans, p. 45. p. 1. ch. 1. sec. 1. art. 5. § 4.) A master or principal will be bound by the special warranty of his servant or agent, in relation to goods sold. (1 *Str.* 653. 1 *Salk.* 289.) Where a broker subscribed a policy in the name of another, proof that he had frequently done so before, was held sufficient evidence *of his authority, to charge the principal. (*Neal v. Erving*, 1 *Esp. Ca.* 61. See 1 *Esp. Ca.* 111. 3 *Esp. Ca.* 64.) *Huguet*, in the present case, was a common broker, and had been frequently employed by the defendants to purchase goods, and had more than once purchased sugar of the plaintiffs, for them. He was, therefore, to be considered as their agent or factor. The letter from the defendants directed him to make the purchase on the terms which they had offered. Although nothing had been said about endorsed notes, yet, as he was not specially instructed to the contrary, his agreement to give endorsed paper, taking into view, also, the general practice on sales of merchandise, was within the scope of his authority. Great inconvenience and embarrassment would result from a contrary doctrine, in all the transactions of commerce, if the agent or broker, employed to make a bargain, were required to communicate the exact terms of his instructions to the vendor. Where a person is employed as a broker, it is always understood, that he is clothed with competent authority to conclude the purchase; and whether he observe his particular instructions, or not, is a question solely between him and his employer.

2. Considering, then, *Huguet*, as having sufficient authority to bind the defendants, the next question is, whether the contract of sale made with the plaintiffs was so complete and valid, as not to be defeated by the statute of frauds. The clerks of the plaintiffs swear that they understood the bargain as finally concluded; and, indeed, all the circumstances proved, show it to have been so. The things sold and the price were agreed upon. The plaintiffs wish the goods to be removed, and the defendants request that they may remain in store, and agree for the storage, at a certain stipulated rate. The import entry is demanded for the purpose of enabling the defendants to obtain the drawback. These acts would not have taken place, if the contract had not been complete and final. The agreement to let the goods remain in the store of the plaintiffs, and that the defendants should pay for the storage at a certain rate, is as strong a symbolical *delivery of them, (see *Cowper*, 204. 1 *Caines*, 46. 1 *East*, 94.) as if a bill of parcels, or a key of the warehouse, had been delivered to the defendants.

ALBANY,
August, 1808
BAILEY and
BOGERT
V.
OGDENS

[* 406]

[* 407]

ALBANY,
August, 1808.
BAILEY and
BOGERT
v.
OGDENS.

(*Hunn v. Bowne*, 2 *Caines*, 38. *Hollingworth v. Nupper*, 3 *Caines*, 182. *Lansing v. Turner*, 2 *Johns*. 16.) A written order for the delivery of goods has been held a sufficient delivery within the statute of frauds. (*Searle v. Keeves*, 2 *Esp. Ca.* 598.) So, where a bargain was struck for the sale of a stack of hay, by the parties on the spot, and the vendee sold a part of it to a third person, who took it away, but without the consent of the vendor, this was left to the jury, as sufficient evidence of a delivery, so as to take the case out of the statute of frauds. (*Chaplin v. Rogers*, 1 *East*, 192.) Putting a mark upon goods has been considered as tantamount to an actual delivery or possession, so as to divest the vendor's right to stop *in transitu*. (*Ellis v. Hunt*, 4 *Term Rep.* 464.) But it may be said that the sale was not complete, because, as the defendants were to give approved endorsed notes, it might be that the plaintiffs would not approve of the endorsers; and if they did not approve of the endorsers, they might stop the goods *in transitu*. The right of stopping *in transitu* grows out of, but does not affect, the contract of sale, and, indeed, is not applicable to a case like the present, or where there is an actual delivery of the goods.

As to a note or memorandum in writing: The names of the parties, and the terms of the contract, were reduced to writing by the plaintiffs, and read to *Huguet*, who assented to them. *Huguet* himself also made a memorandum in his note book, of the contract. It is not necessary that both parties should sign; (see *Roget v. Clapp*, 2 *Caines*, 117.) and writing is equivalent to signing.

In the case of *Suunderson v. Jackson* (2 *Bos. & Puller*, 238.) a bill of parcels given by the vendor, for goods, pursuant to an order, and a subsequent letter of the vendor referring to the order, taken together, were held a sufficient memorandum in writing within the statute.

3. Again, *Huguet*, without a release from the defendants, was an incompetent witness, for if he exceeded his authority, he would be answerable to them; he was, *therefore, interested to show that he acted according to his instructions.

4. Another ground on which the verdict ought to be set aside, is the misdirection of the judge. Though the special count in the declaration averred a delivery, yet if there was a memorandum in writing, that would be sufficient under the statute. Both things, a delivery and a note in writing, need not be shown. The written papers, connected with the other facts, ought to have been left to the jury as evidence of a delivery, (2 *Bos. & Puller*, 238.) but the judge positively directed them on this point, as a question of law, and not for their decision. Again, the judge stated to the jury, that the weighing of the goods, and the delivery of the notes were neces-

arily precedent to the delivery or transfer of the property, unless expressly waived by the defendants. But unless the weighing of the goods forms a part of the bargain or contract of sale, the contract is consummate without it. (2 *Esp. Ca.* 298. 1 *East*, 192.)

In the case of *Hanson v. Meyer*, (6 *East*, 614.) there was a written order to the warehouse-man, "to weigh and deliver the goods," and by the particular terms of the contract, the weighing was an act precedent to the delivery. (a)

ALBANY,
August, 1808.

HAILEY and
BOGERT
V.
OGDEN.

**Hoffman* and *T. A. Emmet*, contra. If there was any misdirection of the judge in this cause, it was in favor of the plaintiffs, for he charged the jury, that if they were satisfied that there was a delivery of the goods, to find a verdict for the plaintiffs. He did no more than state the law on the subject, leaving the facts to the decision of the jury, unembarrassed with any legal questions. The declaration in this case is on a contract of sale, and all material averments must be proved. These averments are,

[* 409

1. The contract of sale.
2. That notes with endorsers were to be given.
3. The delivery of the goods.
4. The weight.

By notes with endorsers, must be understood, such endorsers as the plaintiff should *approve*. The defendants could not compel the plaintiffs to accept notes endorsed by any persons they might think proper to request to write their names on the back of the notes. The stipulation, if intended to have any force, meant that they should be *approved* endorsers. If the defendants had brought their action against the plaintiffs, on the contract for the non-delivery of the sugar, it would have been necessary for them to have averred, that they had given notes with approved endorsers, or had tendered such as

(a) It seems to be a general rule in contracts of sale, where no time of credit is given to the vendee, that the payment of the price or consideration must precede the delivery. 2 *Black. Comm.* 447. 1 *Salk.* 113. 6 *East*, 625. Where there is a sale, therefore, of goods, by *number*, *weight*, or *measure*, at so much a piece, a pound or bushel, it is necessary that the things should be counted, weighed, or measured, before the *price*, or consideration to be paid, can be ascertained. Before this is done, the *contract* of sale, it is true, is considered as existing, so as to give the vendee a right of action for the delivery of the thing, on tendering the price, and the vendor his action against the vendee for the price, on offering to deliver the thing sold. But before the goods are weighed or measured, or the articles counted, the sale is not so consummate and perfect, as absolutely to change the property, but the goods still remain at the *risk* of the vendor. See *Pothier, Traite du Contrat de Vente*, part 4. no. 308. And this appears to be the doctrine, as laid down by Lord *Ellenborough*, in the case of *Hanson v. Meyer*, 6 *East*, 625.

Where the sale is expressed to be at so much a pound, or bushel, it is considered as *made* by the weight or measure; and the weighing, or measuring, is necessary before the sum to be paid can be ascertained; but where the sale is of a certain thing said to contain so much, for a single and entire sum, it is a sale by the whole, or lump, (*per aversionem*), the contract of sale is perfect, and the thing sold remains at the risk of the purchaser *Pothier, ibid.*

ALBANY,
August, 1808.

BAILEY and
BOGERT
v.
OGDENS.

[* 410]

ought to be approved. The giving of notes, then, with endorsements, was a condition precedent to the delivery. Until that was done, the defendants could have no right to demand a delivery of the goods. To support the special count in the declaration, it should be shown, that there was an absolute delivery of the sugars, that the entire dominion over them was transferred, and that the vendor had parted with the possession. Suppose the defendants had become *bankrupts, could their assignees have taken the sugar? Or had they died, would the sugar have been assets in the hands of their administrators? There is no pretence that there was an actual delivery. The witnesses merely state, that the bargain was complete. Has there been a virtual or constructive delivery? There is no instance of a virtual delivery, in which the dominion over the property has not been transferred to the vendee. As in the case of a delivery of the key of a warehouse, and other instances of a constructive delivery, where effectual means are given to the vendee to obtain the use and command of the subject. (2 *Johns*. 56.)

While the goods are in the actual and absolute possession of the vendor, and the price or consideration has not been paid, there cannot be said to be any transfer of the goods to the vendee, so as to give him a right to take and dispose of them.

In the cases which have been cited, the possession of the goods was in the warehouse-man, the auctioneer, or the wharfinger.

The case of *Chaplin v. Rogers*, (1 *East*, 192.) and that of *Hammond v. Anderson*, (1 *Bos. & Puller*, N. S. 69.) were decided on the ground, that a part of the goods had been actually delivered. The delivery of the minute of the *import entry* to the agent of the defendants, cannot amount to a virtual or constructive delivery, for it gave to the defendants no power or dominion over the sugar. Before the export entry could be completed, so as to entitle the defendants to receive the debentures, it was necessary for the plaintiffs, or the importers of the goods, to take an oath, and to conform to the other formalities required by the law of the *United States*. (*Vol. 1. p. 397. sect. 76.*) A delivery, therefore, of the minute of the import entry amounted to nothing.

[* 411]

Again, there was no bill of parcels delivered, no *earnest* given, no part-payment of the price, no mark of the defendants put upon the goods, no delivery of a part of the goods, nor a key of the warehouse, no muniments which could enable the defendants to claim and take possession *of the goods, nor any *indicia* of property, which could amount to a virtual or symbolical delivery. The act of virtual or constructive delivery must be clear, explicit and unequivocal, and with the avowed intent to transfer the possession of the goods. Nothing has been proved but a contract of sale, *in presenti*. Such a con

tract, even before the statute, at common law, unless *earnest* was given to bind the bargain, would require a simultaneous payment or delivery to fix the contract, and transfer the property. If no payment or tender of the price is made, the vendor is at liberty to dispose of the goods as he pleases. (*Roberts, on the Statute of Frauds*, 165, 166.) So that, according to the evidence in the case, the plaintiffs might have refused to deliver the goods, until the price was paid, or the notes with approved endorsers were received, and have sold them to a third person. How, then, can it be said, that the property was so transferred or delivered, as to be at the risk of the vendee?

ALBANY,
August, 1808
BAILEY and
BOGERT
v.
OGDEN.

That the plaintiffs urged the defendants to take the sugar away, proves no more than that they were ready to deliver it, as soon as they received the notes. The agreement about storage could not amount to a virtual delivery, for nothing was to be paid until the expiration of the month. But *Huguet* had no power to agree that the goods should remain with the plaintiffs, or to pay a certain price for storage. If he had not, then that fact furnishes no evidence of a transfer of property. There should have been a receipt given by the plaintiffs for the goods, or a bill of parcels; for had the defendants brought their action for a delivery of the goods, they would have had no document or muniment by which to prove their right of property. There ought to be a reciprocity in this case. If the defendants could not assert their right to the delivery of the sugar, neither ought the plaintiffs to be allowed to maintain their claim for the price.

Again, where goods are sold at so much per pound, and it is necessary that they should be *weighed*, to ascertain the price or consideration to be paid, there the **weight* must precede the delivery; and unless this preliminary act of weighing was expressly waived, there would not be such a delivery as to vest the property in the defendants. (*Hanson v. Meyer*, 6 Term Rep. 615—625.)

[* 412]

In the case of *Lansing v. Strafford*, (2 Johns. 13.) there was a bill of parcels delivered by the vendor with a receipt in full for the price, which the court considered as a complete transfer of the property, so that the thing remained in the store of the vendor at the risk of the vendee.

Then, was there a note or memorandum in writing, of the bargain within the statute of frauds? (a)

The language of the statute is clear and explicit, that the note or memorandum must be signed by the parties to be

(a) The 15th section declares, "that no contract for the sale of any goods, &c. for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by the contract, or their agents, thereunto lawfully authorized." *Laws of New-York*, v. 1. p. 75—80. The 15th section corresponds with the 17th section of the *English* statute.

ALBANY,
August, 1808.
BAILEY and
HOGKERT
V.
OGDENS.

charged. Not one of the authorities cited applies to the present case. Where the memorandum is signed by one party only, it must be the party who is to be charged. The only memorandum here was an entry by the plaintiffs in their books, and that did not express the *weight* of the goods. Admit this to be a signing by the plaintiffs, and that the agent of the defendants assented to it, will it be said that if one party has signed the memorandum, the bare *assent* of the party to be charged shall be equivalent to a signing? This would be to repeal the statute, and open at once the floodgates of fraud and perjury, which it was intended to close. If this court had the power, would they be inclined to defeat what has been always held to be a most wise and beneficial statute?

[*413]

The memorandum made by the agent of the defendants, in pencil, does not identify the articles, nor specify the **weight*, and is too imperfect and unintelligible, to be regarded as a writing within the meaning of the statute.

Again, as to the authority of *Huguet*. He was not a general agent. He could make no purchase for the defendants without an express order for the purpose; he could conclude no bargain without their approbation. His being a broker, by profession, did not constitute him a general agent of the defendants, with indefinite powers. It is admitted, that every special agent must act within the scope of his authority. The letter of the defendants authorized *Huguet* to accede to the terms of sale offered by the plaintiffs, and to try to get a credit of 90 days. He had no power to give a greater price than the one mentioned, or to agree for a less term of credit. If he had power to go further, and to stipulate for security, or endorsed notes, no limit can be assigned to his authority. He might pledge the *real estate* of the defendants as security.

In the case of *Patty v. Carswell*, (2 Johns. 48.) it was held, that a special authority must be strictly pursued, and that where a person was authorized to sign the name of another to a note payable in six months, he had no power to put his name to a note payable in two months. *A fortiori*, an authority to stipulate for a note at 60 days, cannot authorize an agreement to give an *endorsed* note.

Mr. Justice *Ashhurst*, in the case of *Fenn v. Harrison*, said, there was a wide distinction between a general and a special agent; and that an agent acting under a limited power cannot bind his principal by an act in which he exceeds his authority. And in the case of the *East India Company v. Henley*, (1 Esp. Ca. N. P. 111.) Lord *Kenyon* took the distinction between a general and a special agent, and held that, in the latter case, the principal was bound only when the agent acted within his authority.

In the case of *Runquist v. Ditchell*, (3 Esp. Ca. 64. *Abbott* 312

93. S. C.) the broker who advertised the ship, acted with the knowledge of the captain, who was the general agent, and Lord *Kenyon* laid great stress on the *publicity* of the thing, as a circumstance to show the privity and knowledge of the owner.

*That *Huguet* was not authorized to stipulate for endorsed notes, is confirmed by the evidence that the defendants were not in the habit of giving endorsed paper.

Huguet, as a broker or agent, was a competent witness from necessity. (2 *Str.* 647. *Salk.* 239. 1 *Str.* 506. 3 *Wilson*, 40. 2 *H. Black.* 590. 7 *Term Rep.* 480.) And if he exceeded his authority, he would be liable to both parties. To make a witness incompetent, it must be shown, on his *voir dire*, or his interest must be otherwise proved. If it was proved that *Huguet* exceeded his authority, then the plaintiffs could not recover. Again, a witness competent to answer any question, cannot be rejected generally; (3 *Term*, 35, 36.) and he was competent to answer the question as to the authority.

ALBANY,
August, 1808.
BAILEY and
BOGERT.
v
OGDEN.
[* 414]

Pendleton, in reply. 1. The bargain or contract between the parties was definite and complete. Four witnesses, on the part of the plaintiff, prove the bargain to have been concluded, and their evidence is confirmed by the acts and declarations of *Huguet*, as well as by the internal evidence, arising from the letters of the plaintiff; the delivery of the import entry, and the agreement that the goods should remain on storage. But it is said, that the bargain was suspended until Mr. *Ogden* should consent to give endorsed notes, and it is objected that *Huguet* had no authority to give an endorser, and that if he had, no endorser was named or agreed on, and that the goods were not weighed.

It is said that the authority of *Huguet* is special, depending on the letter from the defendants; but the letter, if the whole of it be taken together, seems to contain a general authority to purchase the sugars, leaving the terms to the judgment of the agent; so that whatever he might stipulate relative to the purchase would be binding on the principal.

A broker, from the nature of his employment, is considered as the agent of both parties. His powers must be construed according to the nature of the object of his employment. If he contracts for an object of commerce, he has authority to do what is usual in commerce, in relation to such object. His authority may be distinguished from his particular instructions. Where there are no express instructions to the contrary, his authority is unlimited. If he exceeds his instructions, he will be liable to his principal; but under his authority, arising from the nature of his employment, his acts, in relation to a third person, will be binding on his principal, unless an express prohibition to do the act be shown.

[* 415]

ALBANY,
August, 1808.
BAILEY and
BOGERT
v.
OGDEN.

* 416]

Agents may be distinguished into three kinds; such as have a special authority in relation to a special subject; such as have a general power in relation to a special subject; such as have a general power in relation to all objects. In the case of *Fenn v. Harrison*, (4 Term Rep. 177. S. C. 3 Term Rep. 757.) on the third trial, where it appeared that the principal did not say that he would not endorse the bill, the court were unanimously of opinion, that the agent acting within the general scope of his authority, which was to get a bill discounted, but without any particular instructions, might bind his principal by an endorsement. This is perfectly consistent with the opinion of the majority of the court in the same case, in 3 Term Rep. 757. In the case of *Ringuist v. Ditchell*, (3 Esp. Cas. N. P. 64. See S. C. *Abbott*, 92.) where a broker, who was employed to advertise a ship, inserted a clause in the advertisement, that she was warranted to sail with convoy, though a question was made whether the broker was authorized or not to make the warranty, yet Lord *Kenyon* said, that whether he had done this without authority, was a matter between him and his principal; the public had nothing to do with it, and the principal must be answerable for the acts of the agent, though he exceeded his authority. So in the case of *Hicks v. Hankin*, (4 Esp. Cas. N. P. 114.) though it was held that a special agent, acting with special instructions, could not bind his principal, if he went beyond his instructions, yet if he had any discretion to go beyond the price limited, his authority became general, and his principal would be bound, though he exceeded the limits of his instructions. In the present case, *Huguet* was a broker by profession, and had been frequently employed by the defendants to make purchases, and though the price was mentioned at which the purchase was to be made, yet the matter was clearly left to his discretion. Nothing was said about endorsed notes. He was, therefore, unrestrained in that respect. The letter of the defendant did not say any thing about notes, but only that *Huguet* was to obtain a credit at 60 or 90 days. As well might it be objected that he had no authority to stipulate that the defendants should give their notes. Whether the endorsers were named or not, the bargain was not the less complete and binding.

So as to the weight; if the sugar was purchased at so much per pound, there was a sufficient certainty. The weighing is an incidental thing, and does not affect the contract. As the sugar was to be exported, it was requisite, by the act of Congress, that it should be weighed at the custom-house scales, previous to its being shipped for exportation. And it appears, from the evidence in the case, that where goods are purchased for exportation, it is the practice to pay for them according

the export weight. The case of *Hanson v. Meyer* (6 East, 615.) does not apply to the present case. There the vendor directed his agent "to weigh and deliver his goods;" the weighing, therefore, was a preliminary act. In the case of *Hinde v. Whitehouse*, (7 East, 558.) the goods were not weighed, as they had been previously weighed at the king's scales; and in the several cases which have been cited of the sale of goods by the pound, no objection was ever raised that the contract was not complete, until the goods were actually weighed.

2. Was this a valid contract within the statute of frauds? The 15th section of the statute, which relates to the sale of goods, is different in its language from the 11th section, and takes a middle course between the inconvenience of requiring every contract to be reduced to writing, and the danger of allowing parol contracts. A contract for the sale of goods under this section, will be valid, if the buyer accepts and receives part of the goods sold, or gives something *in earnest* to bind the bargain, or in **part payment*; or if some note or memorandum of the bargain be made and signed by the parties, to be charged with the contract. The act does not say that the contract or agreement must be in writing, but only that there must be some note or memorandum of the bargain. The English statute, from which our own is copied, has, in regard to the 4th and 17th sections, corresponding with the 11th and 15th sections of our act, received the construction for which we now contend. The case of *Wain v. Walters* (5 East, 10.) arose on the 4th section of the English statute; and the court, considering the force of the word *agreement*, decided that the whole contract must be in writing; that is, the consideration for the promise as well as the promise itself; but in *Egerton v. Matthews*, (6 East, 307.) which came under the 17th section, the court were of opinion that it was enough, if there was some note or memorandum of the bargain in writing. The memorandum intended, is for the purpose of refreshing the memory, and preventing any mistake as to the terms of the contract. From the numerous decisions in the courts, both of law and equity, in England, (1 Black. Rep. 599. 1 Atkyns, 503. 2 Bos. & Pull. 328. 9 Vesey, jun. 244. 357. 1 Esp. Cas. 105. 2 Esp. Cas. 598. 4 Esp. Cas. 114. 5 Viner, 127. 2 Ventris, 361. 3 Bro. C. C. 149.) it appears to have been settled, as to the sale of goods, that if there be a note or memorandum in writing sufficient to enable the parties to make out the contract, it is a compliance with the statute. A mere sale note, a letter, or order in writing, has been held a sufficient memorandum to take the case out of the statute. The memorandum in the present case was explicit, containing the names of the parties, the thing sold, and the price and mode of payment.

ALBANY,
August, 1898.
BAILEY and
BOGERT
V.
OGDENB.

[* 417]

ALBANY,
August, 1808.
BAILEY and
BOGERT
v.
ORDENS.

[* 418]

3. That there was a *virtual* delivery of the goods, is evident from the various authorities which have been cited. It is objected that there was no corporal tradition of the sugars or the delivery of any muniment. The agreement as to the storage was tantamount, for the plaintiffs, afterwards, must be considered as the agents of the defendants. In the case of *Hinde v. Whitehouse and Galen*, (7 East, 558.) the goods were not delivered to the vendee, nor were they in a situation to be delivered, yet the contract was held valid, and samples having been delivered, it was considered as a compliance with the statute. In most cases of a sale of goods, the vendor is the agent of the vendee, until an actual delivery, and has the physical power over the goods, though the property is transferred to the vendee. Where *earnest* is given, the vendor is not bound to deliver the goods until the whole money is paid. (1 Salk. 113. 6 Mod. 162. Noy's Maxims, 88.)

KENT, Ch. J., delivered the opinion of the court. This cause depends upon the decision of these two general questions:—

1. Was there a note or memorandum in writing, binding upon the defendants, within the meaning of the statute of frauds? If not, then,

2. Was there a delivery of the sugars, so as to change the property, and throw the risk of the subsequent loss upon the defendants?

1st. The only *memoranda* which were made relative to the transaction, were, an entry of the sale of the sugars, made by one of the plaintiffs in their memorandum book, immediately after the alleged sale, and the minute made with the pencil of *Huguet*, in his pocket memorandum book. The entry of the plaintiffs, made and retained by them, was not binding upon the defendants, because the statute requires the note or memorandum to be signed by the party to be charged. The numerous cases admitting an agreement to be valid within the statute, if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the 4th, and others under the 17th section of the *English* statute; but the words are, in this respect, similar, and require the same construction. (2 Cha. Ca. 164. 1 Powell on Contracts, 286. 5 Viner, 527. pl. 17. 1 Vezey, 82. 3 Bro. C. C. 162. 3 Atk. 503. 6 East, 307. 7 Vesey, jun. 265. 9 Vesey, jun. 234. 351. 1 Esp. Cas. 190. Ballow v. Walker, in this court, Jan. term, 1802. 2 Caines, 120.) It has, however, been said, that there would be a want of **mutuality*, if the plaintiffs in this case were bound by their entry, and the defendants should not be. The same difficulty has

[* 419]

occurred in other cases, and Lord *Redesdale* felt it so strongly, that he observed, (*Lawrenson v. Butler*, 1 *Schoales and Lefroy*, 20.) that to enforce every agreement signed by one party only, against such party, would be to make the statute really a statute of frauds, and that there was no late case in which one party only was bound by the agreement, where equity had decreed performance, though he admitted the import of the statute to be, that no agreement should be in force, but when signed by the party to be charged. He further intimated, that as no man signed an agreement but under a supposition that the other party was bound, as well as himself, if the other party was not bound, he signed it under a mistake, which might be a ground for relief in equity. Whether the plaintiffs, in the present case, were bound at law by their memorandum, or, if bound, whether they might have relief in equity, are questions not before us, and concerning which we are not now to inquire. It is sufficient to say, that the defendants were not bound by any note or memorandum in writing of the contract, unless the same was signed by them, or their authorized agent. *Huguet* was in this instance their agent to make the purchase, and any memorandum made by him respecting the purchase, would operate as a memorandum made by the defendants. But the memorandum which he made, was too vague and indefinite to be a compliance with the statute. The form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning and substance of the statute, and without which, the beneficial ends of it would be entirely defeated. (*Prec. in Cha.* 560. 3 *Atk.* 503. 1 *Vesey*, jun. 333.) The memorandum of *Huguet* is absolutely unintelligible. It has not the essentials of the contract, or memorandum of a contract. No person can ascertain *from it which of the parties was seller, and which was buyer, nor whether there was any actual sale between them, nor what specific article was the object of the sale, or in what quantity, or what was the price. A memorandum much more intelligible than this, and defective only in one essential point, capable of full explanation by a witness, was lately rejected by the Court of *C. B.*, in *England*, on the same ground. (*Champion v. Plummer*, 1 *Bos. & Pul. New Rep.* 252.)

There was, then, no note or memorandum in writing which took the present contract out of the statute of frauds, as far, at least, as it respected the defendants.

2d. The next question then is, whether here was a delivery of the goods, or of any part, so as to take the case out of the statute. The words of it are, that "the buyer must accept

ALBANY,
August, 1808

BAILEY and
BOGERT
V.
OGDEN

[* 420]

ALBANY,
August, 1808.

BAILEY and
BOGERT
v.
JODENS

[* 421]

part of the goods sold, and *actually receive the same.*" But, notwithstanding this strong language of the statute, it has become a settled construction, that actual delivery, in the popular sense of the words, is not, in all cases, requisite, but a virtual delivery will, in some instances, be equally effectual. A delivery may be presumed or inferred from circumstances, and the doctrine on this subject was correctly laid down in this case, in the charge given by the judge to the jury. (2 *Esp. Cas.* 598. *Roberts on Frauds*, 174 to 183. 1 *East*, 192. 2 *Caines*, 44. 2 *Johnson*, 16.) Whether here was a delivery and acceptance, was a fact properly submitted to the jury, and assuming the competency of *Huguet* as a witness, the jury were well authorized to draw their conclusions in favor of the defendants. An objection was made to him on the ground of interest, but I think the objection was properly overruled. If he exceeded his powers, he stood indifferent between the parties, as he would, at all events, be liable to the losing party, whichever it might be, for the injury done by such excess; and if he did not exceed his power, he was liable to neither. (7 *Term*, 480.) According to *Huguet's* testimony, the bargain and sale was never consummated, for not only the person who was to be the endorser, but whether the defendants would or would not give an endorser or surety for the payment, were circumstances attending the contract, left open until the return of one of the defendants from *Philadelphia*. Here was then, in the mean time, the *locus penitentiae*, and the contract could not be said to be fixed. The witnesses, undoubtedly, differed as to the conversations which passed between the parties, but the jury were the sole judges to whom the greater degree of credibility was due, and it is to be recollected, that it was a special jury of merchants. We are not dissatisfied with their verdict upon this ground. Here was no actual delivery, nor an attempt at any symbolical delivery: There was no specific designation of the goods, by marking them, or otherwise: No delivery of the key of the store in which they were lodged. They were left in the actual possession and dominion of the plaintiffs, and under the same apparent ownership as before. If the conversations about storage, and taking a minute of the import entries, would, in such cases, amount to an actual delivery, and be deemed a substitute for the note or memorandum in writing, it appears to me, that the statute of frauds would, in a great degree, become useless, and might be set aside as a dead letter. We do not wish to shake any of the cases in which the *actual delivery* required by the statute has been dispensed with, but those cases have gone far enough; our leaning should be towards the plain meaning of the statute. The circumstances which are to be tantamount to an actual delivery, should be very strong and unequivocal, so as

to take away all doubt as to the intent and understanding of the parties. The agreement about storage might have been conditional, and depending upon the final completion of the contract, as to the giving of the notes with a competent endorser; and the taking of the minute of the import entry, was at least but an equivocal act. It was not an *indicium* of ownership. Any person might have taken the same paper for his own information *or convenience. But if *Huguet* was to be believed, (and his character was well supported, and his testimony corroborated by that of *Lyde*.) there was no delivery or acceptance of the sugars, and the bargain was left incomplete at the time of the loss. The court are of opinion, therefore, ~~that~~ the motion on the part of the plaintiffs for a new trial ~~must~~ be denied.

ALBANY,
August, 1808
JACKSON
v.
DEYO

[* 422]

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Rule refused.

JACKSON, *ex dem.* WHITBECK and GARDINIERE, *against*
DEYO.

THIS was an action of *ejectment*, for land in *Kinderhook*. The cause was tried before Mr. Justice *Van Ness*, at the *Columbia* circuit, in *October*, 1807.

Thomas L. Whitbeck became seised of the premises in 1788, and died in 1798, without issue, leaving his father, one of the lessors of the plaintiff, his heir at law.

The defendant produced a contract, under the hand and seal of *Thomas L. Whitbeck*, dated 5th *July*, 1796, by which, in consideration of 20*l.*, he covenanted to convey the premises in question in fee, to *Christenda Goes* and *Edie Goes*. The payment of the consideration-money was proved, and also an assignment of the contract, and all the interest of *Christenda Goes* and *Edie Goes*, to *Paulus Kane*; and also a deed from *Paulus Kane* and his wife, to the defendant, dated 5th *December*, 1801, with covenants of seisin and warranty.

The counsel for the defendant contended, that the evidence made out a legal defence in an action of *ejectment*; and that, at least, the defendant was entitled to a previous notice to quit;

An equitable title cannot be set up in an action of *ejectment* against the legal estate. A person in possession of land, and who claims to hold it in fee, is not entitled to a notice to quit, previous to bringing an action of *ejectment*; but there must be a tenancy, or existing relation of landlord and tenant.(a)

(a) *Jackson v. Stewart*, 7 *Johns*. 156. See *Jackson v. Colden*, 4 *Cow. Rep.* 278, 279. *Jackson v. Stackhouse*, 1 *Cow. Rep.* 122. *Jackson v. Aldrich*, 13 *Johns*. 106.

ALBANY,
August, 1808.

JACKSON

v.
DEYO.

[* 423]

but, under the direction of the judge, the jury found a verdict for the plaintiff.

A motion was now made for a new trial.

**E. Williams*, for the defendant. The first question is, whether the heir of *Thomas L. Whitbeck*, being a trustee, can maintain an action of *ejectment* against the *cestui que trust*. This contract being under the hands and seals of the parties, and for a valuable consideration, its performance would be enforced in a court of equity.

SPENCER, J. It was expressly decided by this court, in the case of *Jackson, ex dem. Smith & Bowne, v. Pierce*, (2 *Johns.* 221.) that where the legal title is in the plaintiff, in an action of *ejectment*, the defendant will not be allowed to set up an equitable title against the action at law.

Williams. Then we claim the benefit of a notice to quit, on the authority of the decision of this court, in the case of *Jackson, ex dem. Benton, v. Laughead*, (2 *Johns.* 75.) If a mortgagor, who has a mere right of redemption, on payment of the money, cannot be turned out of possession, without a previous notice to quit, *a fortiori*, the defendant, having a beneficial interest in the land, and being in possession, is entitled to notice. The defendant does not hold the land by consent.

Van Beuren, contra, was stopped by the court.

Per Curiam. The defendant has only an equitable title, which cannot prevail against the legal estate. (2 *Johns.* 221.) And he cannot be entitled to a notice to quit, since the defendant claims to hold in fee; and there is no *tenancy* whatever. It never has been decided, that a notice to quit was necessary, unless, where the relation of landlord and tenant existed. A mortgagor is *quasi* tenant at will. But here, there is no semblance of any such relation. We might as well require a previous notice to quit in every case.

Judgment for the plaintiff.

OF THE STATE OF NEW-YORK.

ALBANY,
August, 1808

JACKSON
v.
CLARK.

*JACKSON, *ex dem.* GREEN, against CLARK.

THIS was an action of *ejectment*. The cause was tried before Mr. Justice *Thompson*, at the *Clinton* circuit, in *June*, 1808.

At the trial, the plaintiff produced in evidence, a writing as follows:—

“This is to certify, that I have bargained and sold, the one equal half of lot No. 20, in the great location of the *Sable*, for 14 shillings per acre, to *Rufus Green*, the interest to commence from the 1st *July*, 1792.

“*Nathaniel Platt.*”

It was admitted, that previous to the year 1792, *Platt* was seised in fee of the premises in question; that he was in possession, at the time he gave the above writing; and that in the year 1801, he conveyed the premises to one *Lovely*, by deed, who took possession at the same time, and, afterwards, conveyed the land to the defendant. The defendant took possession under the last-mentioned deed, and has held the premises to this time.

The defendant proved, that nothing had ever been paid by *Green*, for the land, either at the time of the bargain mentioned in the certificate, or at any subsequent period.

It was proved, on the part of the plaintiff, that *Green* was to have this own time to pay for the land, having rendered services to *Platt*, who, for that reason, gave him the indulgence, as to payment.

Platt was offered as a witness to prove that *Green* gave up the contract, but he was objected to by the plaintiff, and rejected by the judge.

A verdict was taken, by consent, subject to the opinion of the court, on a case.

Skinner, for the plaintiff

Foot, contra.

THOMPSON, J. I had no doubt, at the trial, that the paper produced by the plaintiff was a mere memorandum *of a conveyance, and should have ordered a nonsuit, had not the plain-

P. gave to G. a writing, as follows: “This is to certify that I have bargained and sold the one equal half of lot No. 30, in the great location of the *Sable*, for 14 shillings per acre, to *Rufus Green*; the interest to commence from the 1st *July*, 1792.” It was held, that this was a mere agreement for a conveyance, and did not amount to a conveyance, or a lease. (a)

[* 425]

(a) *Ives v. Ives*, 13 *Johns.* 235. See *McDonald v. Hewett*, 15 *Johns.* 349, and the cases in the note to *Jackson v. Myers*, ante. p. 388.

ALBANY,
August, 1808.
LITTLEFIELD
v.
STOREY.

tiff's counsel urged that the cause might go to the jury, and the question be reserved, as to the operation of the writing given in evidence.

Per Curiam. This is a mere agreement, that *Green*, on paying 14 shillings per acre, with interest, from the 1st *July*, 1792, should have a conveyance of the land. It is not a conveyance nor a lease. No consideration is expressed or paid; no rent reserved, nor are there any words importing a lease. It is a memorandum of an executory agreement to sell the land, and nothing more. There must be, according to the case, a judgment of nonsuit.

Judgment of nonsuit.

LITTLEFIELD *against* STOREY.

The court will take notice of and protect the right of an assignee of a chose in action. (a) The party demurring must make up the paper books, and bring on the cause. (b)

THIS was an action of *debt*. The declaration contained two counts, on two obligations for 100 dollars each. The defendant pleaded *non est factum*, and that, on the 1st day of *August*, 1806, he paid to the plaintiff, the money due on the obligations. The plaintiff replied, that before the commencement of the present suit, and before the said 1st day of *August*, 1806, he sold and assigned over the said obligations to one *Z. R. Shepherd*, to have and receive the money due thereon to his own use, and did authorize him, in the name of him, the plaintiff, to demand and receive the same to the use and benefit of him, the said *Shepherd*, of which the defendant had notice; and the plaintiff averred, that this action was commenced for the sole use and benefit of the said *Shepherd*, for the purpose of enabling him to collect and receive the money due on the obligations.

To this replication there was a general demurrer and joinder. (c)

[* 426]

*A preliminary question was raised by the counsel, as to the right of the plaintiff to make up and deliver the paper books, and to bring on the cause: and the court said, that it had

(a) *Briggs v. Dorr*, 19 *Johns.* 95. *Wheeler et al. Ex. v. Wheeler*, 9 *Cow. Rep.* 34 19 *Johns.* 52. 15 *Johns.* 405. 16 *Johns.* 51.

(b) See *Van Buskirk v. Burr*, 20 *Johns.* 275.

(c) See *Prescott v. Hull*, 17 *Johns. Rep.* 292.

been formerly decided, (a) that the plaintiff was entitled to prepare the paper books, and bring on the cause; but that for some time past, a different practice had prevailed, and the party demurring was allowed to make up the books and bring on the cause to argument.

ALBANY,
August, 1808.
CARVER
V.
TRACY.

Weston, in support of the demurrer.

Z. R. Shepherd, contra, was stopped by the court.

Per Curiam. This is a clear case. It has been decided, that this court will recognize and protect the rights of an assignee of a *chose in action*.

In the case of *Andrews v. Beecker*, (b) it was held, that a release by the obligee of a bond, after an assignment, and notice, was a nullity. (See also *Legh v. Legh*, 1 Bos. & Pull. 447.)

Judgment for the plaintiff.

(a) *April term, 1800*. But it seems more consistent to allow the party demurring, to bring on the cause; and there is no danger of delay, since, by the rules of the court, the opposite party may also give notice of bringing on the cause, and may have judgment by default, in the same manner as if it were a case after a verdict, if the party demurring does not deliver the paper books, and move to bring on the cause, pursuant to his notice.

(b) Decided in *July, 1800*, and recognized in the case of *Wardell v. Eden*, 1 Johns. 532. *in note*.

*CARVER against TRACY.

[* 427]

ON *certiorari*. The suit before the justice was for one dollar, had and received to the use of the plaintiff. The defendant said that he had received a dollar of the plaintiff, but it was his due. On this declaration, the justice, without further evidence, decided that the plaintiff was entitled to recover, and that the defendant must prove the debt he claimed.

Where a defendant, in a suit before a justice for money had and received, admitted that he received the money of the plaintiff, but that it was his due, and the justice thereupon gave judgment for the plaintiff, it was held to be erroneous. The whole declaration of the defendant should

Gold, for the plaintiff in error.

Henry, contra.

Per Curiam. The justice was manifestly wrong. The

be taken together, and in this case was, substantially, a denial of the plaintiff's demand. (a)

(a) *Smith v. Jones*, 15 Johns. 229

ALBANY,
August, 1808.
GOODENOW
v.
TRAVIS

whole conversation of the defendant must be taken together. The plaintiff could not take one part, and reject the other. What was said by the defendant, taken together, was a denial of the demand of the plaintiff, who was bound to prove it.

Judgment reversed.

GOODENOW *against* TRAVIS.

In a suit before a justice against a tavern keeper, for not entertaining the plaintiff, the defendant pleaded not guilty, and set off a trespass by the plaintiff, in his house, &c., and he jury found a verdict for the defendant for six cents damages and six cents costs. It was held, that [* 428] the matter alleged by way of set-off was to be taken as a justification under the general issue: and the verdict as a general verdict for the defendant, rejecting the six cents damages and costs.

ON *certiorari*. The plaintiff below declared against the defendant, who was a tavern keeper, for refusing to entertain him. The defendant pleaded not guilty, and set off a trespass by the plaintiff in breaking a door, &c., and that he was a person of bad reputation. A verdict was found for the defendant for six cents damages and six cents costs.

S. Ross, for the plaintiff in error.

Nicoll, contra.

Per Curiam. The plea was not guilty, and the set-off of the trespass or violence done by the plaintiff in the *house, and his bad character, was meant only as a reason or justification for not entertaining him, and was intended to support the plea of not guilty. The verdict for six cents damages and six cents costs was intended, and is to be considered, merely as a verdict for the defendant, generally.

Judgment affirmed.

ALBANY,
August, 1808.SERJEANT
v.
HOLMES.SERJEANT *against* HOLMES.

ON *certiorari*. The plaintiff below commenced two suits against the defendant, by summons, issued at the same time, and returnable at the same hour, before the same justice. On the return of the process, the plaintiff declared in one of the suits on a note for 20 dollars, and the defendant, on being asked by the justice whether he had any defence, answered that he had none. The justice thereupon gave judgment for the plaintiff for the amount of the note. The plaintiff then declared, immediately afterwards, in the second action, on a note for six dollars, and the defendant pleaded a set-off of twelve dollars, but the justice refused to allow it.

Gold, for the plaintiff in error

Kirkland, contra.

Per Curiam. The act (*Laws of N. Y.* vol. 1. p. 494. § 9.) directs, that if any defendant shall neglect or refuse to set off any account or demand he has against the plaintiff, such defendant shall be for ever thereafter precluded from having any action against the plaintiff to recover the same, or any part thereof. The true construction is, that the defendant must set off, the very first opportunity he has for that purpose. By omitting to set off his demand against the first action, the defendant lost his right of set-off, and his demand became for ever *extinguished*. The justice was, therefore, right in refusing the set-off in the second suit.

Judgment affirmed.

325

In suits before justices of the peace, the defendant must set off his demand against the plaintiff, the first opportunity he has for that purpose, or he will be precluded afterwards.

Thus, where two suits by the same plaintiff, against the same defendant, were pending at the same time, and the defendant suffered judgment to pass against him in the first, and then set off his demand in the second suit, it was held, that it should have been made in the first suit, and was too late to be allowed in the second.

ALBANY,
August, 1806.

M'CARTY
v.
SHERMAN.

*M'CARTY and M'CARTY *against* SHERMAN.

In an action of debt before a justice on a judgment obtained before another justice, a certificate under the hand and seal of the justice, whose hand-writing was proved by a witness, was held not to be sufficient evidence, on a plea of *nil tiel record*. The certificate should be proved by the justice himself or a sworn copy of his minutes be produced. (a)

IN ERROR, on *certiorari* from a justice's court. The defendant in error brought an action of debt on a judgment for 17 dollars and 79 cents, obtained before another justice, against the plaintiffs in error. The plea was *nil tiel record*. On the trial, a certificate of the judgment, under the hand and seal of the former justice, was produced, but was not proved, except by a witness who testified to the hand-writing. It was read in evidence, though objected to by the defendant. There was also a difference of 8 cents in the sum mentioned in the certificate, and the debt stated in the declaration.

Henry, for the plaintiffs in error. •

Sedgwick, contra, cited *Kellogg v. Mauney*, (2 Johns. 378.)

Per Curiam. The objection to the certificate of the former justice, as evidence, was well founded. It ought to have been proved by the justice himself, who gave the judgment, or a sworn copy of his minutes should have been produced. In the case of *Kellogg v. Mauney*, the evidence of the certificate was not objected to, and was, therefore, considered as admitted. The judgment below must be reversed.

Judgment reversed.

(a) See *Thomas v. Robinson*, 3 Wend. Rep. 267.

ALBANY,
August, 1808.YOUNG
v.
HUBBELL &
ROOT.*BROWNELL *against* SLOCUM.

ON *certiorari*. The error assigned on the return of the *certiorari* in this cause, was, that the oath administered to the only witness sworn in the cause, did not correspond with the form required by the act. No objections were raised at the time, to the form in which the oath was administered.

Where no exception is made to the form of the oath administered by a justice, at the time of trial, it cannot afterwards be alleged for error.

D. Shepherd, for the plaintiff in error.

Allen, contra.

Per Curiam. By the 16th section of the act of the last session, (*sess.* 31. ch. 204.) it is provided, that no omission or misrecital of any oaths prescribed by the act, in the return of any justice to a *certiorari*, shall be assigned for error, unless it be alleged in the affidavit, on which such *certiorari* issued, that exception was made to the form of the oath administered at the trial. The judgment below must be affirmed.

Judgment affirmed.

YOUNG *against* HUBBELL and ROOT.

ON *certiorari*. After the cause below had been submitted to the jury on a question of fact, and evidence given on both sides, the justice took the cause from the jury, and nonsuited the plaintiff.

Where a cause has been once submitted to a jury by a justice, he cannot afterwards take it from the jury, and nonsuit the plaintiff.

Per Curiam. After the cause had gone to the jury, it ought to have been decided by them. The justice had no right to interfere, and prevent their verdict. The judgment must be reversed.

Judgment reversed.

ALBANY,
August, 1808.

TODD
v.
CROOK
SHANKS

*POTTER against LUTHER.

In the case of a public officer, as a sheriff, deputy sheriff, justice of the peace, constable, &c., it is sufficient to prove that he acted as a public officer, without producing his appointment. (a)

ON *certiorari*. The plaintiff below brought an action of trespass *de bonis asportatis*. The defendant pleaded that, as one of the deputy sheriffs of *Washington* county, he took the goods by virtue of a *fiery facias* issued out of the Court of Common Pleas, and offered witnesses to prove, by reputation, that he was a general deputy of the sheriff; but the justice overruled the evidence, and required that the defendant should produce and prove his appointment by the sheriff.

Crary, for the plaintiff in error.

Foot, contra.

Per Curiam. It is a general rule to admit proof by reputation, that a person acts as a general public officer or deputy. In *Berryman v. Wise*, (4 Term, 366.) the Court of *K. B.*, in *England*, decided, that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters, without producing their appointments, and that even in a case of murder.

Judgment reversed.

(a) *Wilcox v. Smith*, 5 Wend. Rep. 233.

[* 432]

*TODD against CROOKSHANKS.

A. gave a promissory note to B. and C., who were executors, and afterwards paid the note to B. and took a receipt in full, the note being in the custody of C., was demanded by A., and on C.'s refusal to deliver it, A. brought an action of *detinue* for the note, and it was held that the action would not lie, as the note, after it was paid, was of no value, and in the hands of the payee. *Detinue* or *trover* will lie for a promissory note, in the hands of a third person.

ON *certiorari*. The plaintiff below brought an action of *detinue* against the defendant for a promissory note, dated the 12th of *January*, 1801, for 20 dollars. From the evidence produced at the trial, it appeared that the defendant had purchased of the plaintiff and one *Mary Crookshanks*, as executors, &c., some property, for which he gave to them the note in question. That the defendant afterwards paid the amount

of the note to *Mary Crookshanks*, and took her receipt in full; but the note being in the hands of *Todd*, the other payee, was not given up; and on his refusal to deliver it, the defendant in error brought his action against him before the justice. It was objected on the part of the defendant below, that the plaintiff had no property in the note sufficient to support an action, it being of no value after it was paid; but the justice overruled the objection, and gave judgment for 25 dollars damages.

ALBANY,
August, 1809
WILSON
V.
LARMOUTH

Crary, for the plaintiff in error.

Skinner, contra.

Per Curiam. There was no foundation for the action below. After the note was paid, and a receipt in full given, by one of the payees, it was completely discharged, so as to be of no value. The note did not belong to the plaintiff, and it might be useful to *Todd*, the other payee, who was a co-executor, to show that he had not received the money. An action of trover will lie for a note in the hands of a third person; but such an action as this was never before brought.

Judgment reversed.

*WILSON against LARMOUTH.

[* 433]

ON *certiorari*. The plaintiff below declared in an action of assumpsit for 25 dollars, and the defendant pleaded *non assumpsit*, and a set-off of five dollars damages, done by the plaintiff's cattle, on the land of the defendant; the plaintiff did not object to the set-off, and the cause was tried by a jury, who found a verdict for the defendant for 15 dollars damages.

In an action of *assumpsit* before a justice, the defendant pleaded *non assumpsit*, and set off five dollars damages for a trespass; the plaintiff did not object to the set-off, and the jury found a verdict for the defendant for 15 dollars. It was held, that as the plaintiff did not at the time object to the set-off, he could not

Crary, for the plaintiff in error, objected, that the set-off ought not to have been allowed; and that, at all events, the defendant was not entitled to recover more than the sum of five dollars.

Skinner, contra.

afterwards allege it as error; and that though it would be error in form if a jury were to find more damages for a plaintiff than he had alleged in his declaration; yet the jury being the judges of the damages of the trespass set off by the defendant, the verdict will not be set aside because they found more damages than the defendant alleged, it being no error in substance.

ALBANY,
August, 1808.

JONES
v.
WILSON.

Per Curiam. As the plaintiff made no objection to the set-off at the time of the trial, but suffered it to go to the jury, it is now too late to make the objection here. In the case of a plaintiff, it would be error if the verdict should be for more damages than are laid in the declaration, but it is error in *form*, not in substance. The jury were the proper judges of the *quantum* of damages; and it would be against right and justice to set aside this judgment, on a point of form.

Judgment affirmed.

[* 434]

*JONES *against* WILSON.

A constable who suffers an execution to sleep in his hands, and then pays the money to the plaintiff, without any previous demand of the defendant, and without his request, cannot maintain an action against the defendant for the amount paid to the plaintiff on the execution. (a)

ON *certiorari*. The plaintiff below was a constable, and had an execution against the defendant below, issued by a justice of the peace, at the suit of a third person. The constable, without making any demand on the defendant, and without his request, paid the money to the plaintiff named in the execution, and then brought his action before a justice against the defendant, to recover the amount so paid, to the use of the defendant. An objection was made to the plaintiff's right to bring the action, but the justice overruled the objection, and permitted the cause to be tried by a jury, who found a verdict for the plaintiff.

Skinner, for the plaintiff in error.

Allen, contra.

Per Curiam. The constable had no right to sleep on the execution, and then pay the money to the plaintiff and bring his action against the defendant, without any previous demand or request. Such a practice is not only against the rules of law, but would tend to multiply suits, and increase litigation.

Judgment reversed. (b.)

(a) *Reed v. Pruyn*, 7 Johns. Rep. 426. *Overseers of Walkill v. Overseers of Mamakating*, 14 Johns. 87. *Willard v. Canfield*, 5 Wend. Rep. 61. See *Overseers of Walkill v. Overseers of Mamakating*, 14 Johns. 87.

(b) *S. P. Menderback v. Hopkins*, 8 Johns. Rep. 436. So, if a collector of taxes pay over the defendant's tax to the treasurer, without his request, an action is not maintainable to recover the money paid. *Beach v. Vandenburg*, 10 Johns. Rep. 361.

ALBANY,
August, 1808.TOWNSEND
v.
LEE.*V. DDER *against* TOWNSEND.

ON certiorari. The plaintiff below declared against the defendant, in an action of trespass *quare clausum fregit*, and taking away ten sheep; for cutting down and carrying away ten trees; and for wounding and maiming a horse. The defendant pleaded not guilty. The evidence produced at the trial was detailed in the return, but it is unnecessary to state it here.

E. Williams, for the plaintiff in error.

Richardson, contra.

Per Curiam. If the evidence given at the trial had not been set forth in the return, we might have presumed that it was sufficient to support the declaration. But as it is spread before us, we must decide upon it, and we are of opinion, that it does not support the declaration; and that the judgment below must, therefore, be reversed.

Judgment reversed.

Where the evidence given at the trial of a cause before a justice is set forth in the return to a *certiorari*, the court will decide, whether it was sufficient to support the plaintiff's declaration, and if they consider it insufficient, the judgment below will be reversed. But if the evidence is not stated in the return, the court will presume that it was sufficient to support the declaration.

TOWNSEND *against* LEE.

ON certiorari. After issue joined between the parties before the justice, the defendant requested an adjournment of the trial for three months, on account of the absence of a material witness in *Vermont*, which was granted. The parties appeared on the day appointed, and the defendant requested a further adjournment of the trial, on account of the absence of the same witness. The justice required the defendant to state what he expected to prove by the witness; and the justice being of opinion that it was not material, refused to adjourn the trial a second time. The jury found a verdict for the plaintiff below, for 25 dollars.

Where a justice has once adjourned a cause for three months, at the request of a party, he cannot grant a second adjournment at the request of the same party. (a)

**Richardson*, for the plaintiff in error.

[* 436]

(a) *Smith v. Fenton*, 2 Cow. Rep. 425, and the cases cited in the opinion of the court. *Cowen's Treatise*, 505 to 509.

ALBANY,
August, 1808.

M'NEIL
v.
SCOFFIELD.

E. Williams, contra.

Per Curiam. The justice having once adjourned the cause for three months, at the request of the defendant, he could not, afterwards, grant a second adjournment, at the request of the same party.

In the case of *Easton v. Coe*, (2 *Johnson*, 383.) the first adjournment was with the consent of the parties, and not by order of the justice. The judgment must be affirmed.

Judgment affirmed.

M'NEIL *against* SCOFFIELD

In actions before justices of the peace, the jury may decide both the law and the fact. Where a party makes no objection at the time, to the form of the plaintiff's declaration, he cannot avail himself of any defects, which appear on the return to the *certiorari*. The court, as to the proceedings before justices of the peace, will look to the right and justice of the case, without regard to matters of form or technical niceties. If the plaintiff declare in *assumpsit*, and also for a *fraud*, the defendant cannot
[* 437]
object to the declaration on the return to the *certiorari*. (a)

ON *certiorari*. The plaintiff below declared against the defendant, in *assumpsit*, for 25 dollars, difference agreed to be paid by the defendant, on an exchange of horses between him and the plaintiff; and also for 25 dollars, for fraud in the exchange of horses, and concluded to the damage of 25 dollars. The defendant pleaded the general issue and a set-off.

It was proved, that the defendant had confessed that he exchanged horses with the plaintiff, and was to pay a sum of money for the difference in the price; but how much, the witness did not recollect.

It was also proved, that the difference in the value of the horses was 35 dollars. The jury found a verdict for the plaintiff for 25 dollars, for which the justice gave judgment.

Skinner, for the plaintiff in error.

Z. R. Shepherd, contra.

Per Curiam. It is objected, that a count on contract and fraud could not be joined in the same declaration. This would, no doubt, be a valid objection, on a motion in arrest of judgment here, where the court are judges of the law; and the jurors decide on the facts: But in proceedings before justices of the peace, under the act *for the recovery of debts to the value of 25 dollars, the jury may decide both the law and the fact. Again, where the party makes no objection to the plead-

(a) *Bowditch v. Salisbury*, 9 *Johns.* 366. *Stolp v. Van Cortland*, 3 *Wend. Rep.* 432.
332

ings at the time, but consents to go to trial upon them, we have repeatedly decided, that he shall not avail himself of any defects in the form of pleading, which may appear on the return to the *certiorari*. This court will look to the right and justice of the case, without regard to technical niceties, or matters of form. It is further objected that the evidence did not support the declaration; but the declaration was not on the special agreement.

It was proved that the defendant had promised to pay the difference between the horses; but the precise sum was not stated. The law implies, and the court will intend, that it was the real difference in value between the two horses, which was proved to be 35 dollars.

Judgment affirmed.

ALBANY,
August, 1806.
INGERSOLL
v.
WILSON.

INGERSOLL, jun. against WILSON.

ON certiorari. The plaintiff below declared on a promissory note; the defendant pleaded *infancy*, and issue was joined on that fact. The justice, from examination and inspection of the defendant, was of opinion that he was not an infant, and did not, therefore, assign him a guardian. The fact being submitted to the jury, they found that the defendant was not an infant, either at that time, or when he gave the note.

The plaintiff in error, on the return to the *certiorari*, specially assigned for error, the infancy of the defendant, and there was a general joinder in error.

T. Wood, for the plaintiff in error, contended, that the defendant, by the joinder in error, had admitted the fact of infancy.

Kellogg, contra.

Per Curiam. The special assignment of infancy as error was against the record below, and the fact, as found by the jury, and was, therefore, bad. The judgment must be affirmed.

In an action before a justice, the defendant pleaded infancy, and the justice, from examination, was of opinion, that he was not an infant, and did not appoint a guardian, and the jury found that the defendant was not an infant. On the return to the *certiorari*, it was held, that the infancy of the defendant could not be assigned for error, it being against the record, and the fact, as found by the jury.

[* 438]

Judgment affirmed.

ALBANY,
August, 1868.

BENNET
v.
HURD.

BENNET and BENNET *against* HURD.

In an action for a penalty under the 35th section of "the act to regulate highways," the plaintiff need not negative the proviso, in his declaration.

ON *certiorari*. The action below was brought on the 35th section of "the act to regulate highways," (vol. 1. p. 602.) for obstructing the *Susquehanna* River. On the return to the *certiorari*, the principal objection was, that the plaintiff in his declaration had not negatived the right of the defendant under the *proviso*.

Sherwood, for the plaintiff in error, cited the case of *Blasdale v. Hewitt*, (3 *Caines*, 137.)

[KENT, Ch. J. That case is so stated, that it is impossible to say on what ground it was decided by the court.]

H. Bleecker, for the defendant in error.

Per Curiam. The *proviso* in the 35th section, on which the suit was brought, formed no part of the plaintiff's title, but merely furnished matter of excuse for the defendant. It provides that persons erecting mills on the rivers declared to be public highways, and cutting canals for the use of the mills, so as not to injure the navigation, shall not be liable to the penalties of the act. It was not necessary, therefore, for the plaintiff to negative this *proviso* in his declaration.

Judgment affirmed

ALBANY,
August, 1808.

BRUSH

v.
Administrators
of REEVES.***WILSON against FENNER.**

ON the return to the *certiorari*, in this cause, it appeared, that the suit below was on a promissory note, and the defendant did not appear or make any defence in the cause; and the justice then said, "Being convinced by the evidence adduced by the plaintiff, I gave judgment," &c.

Where a justice returned to a *certiorari*, that, "being convinced by the evidence adduced, he gave judgment," &c. the court intended that it was on legal evidence.

Per Curiam. The evidence mentioned by the justice, the court will intend to be legal evidence, given under oath, and not merely the production of the note. The justice is not bound to state the evidence in his return, unless called upon to do so. The usual form of giving judgment is to say, "After hearing the allegations and proofs of the parties," &c. If the plaintiff in error wished for explanation as to the evidence offered, he should have applied to the court for a rule on the justice for that purpose.

Judgment affirmed.

BRUSH against The Administrators of REEVES.

THE plaintiff declared on a promissory note, given by one *Spring* to *Reeves*, the intestate, and payable to him or *bearer*. The note was endorsed over by *Reeves*, and the present suit was brought by the endorsee against his administrators. There was a general demurrer to the declaration, which was in the usual form against the endorser.

If the payee of a note payable to him or *bearer*, puts his name on the back, he may be sued as an endorser, in the same manner as if it was payable to his order.

E. Williams, for the defendant, objected that the declaration ought to have been special.

Per Curiam. The note was negotiable under the statute, and transferable without endorsement; but if the payee chose to put his name on the back, he became as much bound as an endorser, as if the note had been made payable to him or order.

*It was ruled by Chief Justice *Holt*, in the case of *The Bank of England v. Newman*, (1 Lord Raym. 442.) that if a person

[* 440]

ALBANY,
August, 1808.
JOHNSTON
v.
ROBINS.

endorses a bill payable to bearer, he becomes a new security and is liable on the endorsement. The declaration at least good on a special demurrer. But the defendant may withdraw the demurrer, on payment of costs, and pleading forthwith.

Judgment for the plaintiff.

JOHNSTON *against* ROBINS.

In every case of a service of a notice, except it be to bring a party into contempt, the leaving the notice at the dwelling house of the party is sufficient, and is considered as a personal service.

JOHNSON, for the defendants, moved to set aside the default entered for not pleading, in this cause, and all subsequent proceedings, for irregularity. From the affidavits which were read, it appeared, that on the 17th *May* last, a copy of the declaration, with a notice of the rule to plead, was served on the defendant, by delivering the same to a young man at the house of the defendant, in his absence, who said he was a clerk of the defendant, and lived in the house, and that he expected the defendant home soon, and that he would deliver the papers to him as soon as he returned.

On the 1st day of *June*, the defendant's attorney gave notice of his being concerned, and of special bail, to the plaintiff's attorney; and on the same day, the plaintiff's attorney sent to the attorney of the defendant, a copy of the declaration, with a notice, that a rule to plead had been entered on the 17th day of *May*, which had been served, with a copy of the declaration, on the defendant; and that time to plead would be computed from that day, and that the copy was served on the attorney, at his request, and not under the rule.

[* 441]

On the 7th *June*, the plaintiff's attorney entered the default of the defendant for not pleading, on an affidavit of service of the declaration and rule to plead on the defendant, as above stated. On the 13th *June*, a plea was filed, and a copy thereof served on the plaintiff's attorney, who sent it back to the defendant's attorney, who, on the 5th *July*, entered a default for want of a replication. The venue in the cause was laid in *King's* county, and the plaintiff's attorney offered to waive the default, if the defendant would consent to go to trial at the *June* circuit in that county, which offer was refused, the defendant's attorney conceived that he was not bound to plead until the 20th *June*, and that the service of the declaration and rule to plead on the defendant, was insufficient; and

because *George Fair*, a material witness, was absent from the state, whose attendance could not be procured in time.

ALBANY,
August, 1808.

Ross
v.
VAUGHAN.

Sedgwick, contra, read an affidavit stating, among other things, that the plaintiff's attorney had never accepted any plea from the defendant or his attorney; and that the witness mentioned by the defendant, resided in *Hackensack*, in *New-Jersey*, and that his attendance might easily have been procured at the last circuit, in the county of *King's*.

Per Curiam. It was decided in the case of *Jackson*, ex dem. *Griffiths*, (4 Term Rep. 465.) that in every case of the service of a notice, leaving it at the dwelling-house of the party, was to be considered as a personal service, for every purpose, except to bring the party into contempt. We consider the declaration as having been personally served on the defendant, on the 17th *May*, and that the defendant was bound to plead in 20 days thereafter. The default was, therefore, regularly entered; and the affidavits do not disclose equitable grounds sufficient to induce the court to interfere and set aside the default upon terms. The offer of the plaintiff to waive the default, was reasonable; but the defendant chose to rest himself upon what he conceived to be the rule of practice as to the service of notices.

Rule refused.

*ROSS against VAUGHAN.

[* 442]

FOOT, for the defendant, moved for judgment as in case of nonsuit, on the usual affidavit.

Skinner, contra, read an affidavit, stating that the cause was not noticed for trial at the last circuit in *Essex* county, because the attorney, knowing that many causes of an elder issue were actually noticed, and that much business was to come before the *oyer* and *terminer*, to be held at the same circuit, did not believe that the cause could be tried. It appeared, that but one civil cause was, in fact, tried at the circuit, for want of time. On these grounds, he contended that the plaintiff was not bound to stipulate.

The rule adopted in regard to causes to be brought to trial at the sittings in *New-York*, that if it is made to appear that the cause could not have been tried, had it been noticed, it shall excuse the plaintiff from stipulating to bring it to trial at the next court, or be nonsuited, is not applicable to causes at the country circuits.

Per Curiam. A rule has been adopted in regard to causes tried at the sittings in *New-York*, that where it is made to

ALBANY,
August, 1808.

TALCOT
v.
WOODRUFF.

appear, that the cause could not have been tried, had it been noticed for trial, the plaintiff, on a motion for a nonsuit, shall be excused from stipulating ; but this rule was not intended to be applied to causes at the country circuits, where the reason for it can seldom exist. The plaintiff must stipulate, or be nonsuited.

Rule granted.

[* 443]

*TALCOT *against* WOODRUFF, Sheriff, &c.

On a notice for a judgment as in case of nonsuit, for not proceeding to trial, in an action against a sheriff, where the plaintiff is entitled to stipulate, he is not bound to pay double costs on making the stipulation. (a)

GRISWOLD, for the defendant, moved for judgment as in case of nonsuit, for not proceeding to trial.

Kirkland, contra, offered to stipulate to try the cause at the next circuit, or be nonsuited, and the only question was, whether, as this was an action against a sheriff, the defendant was entitled to double costs.

Per Curiam. The defendant is not, in this case, entitled to double costs ; the statute (*Laws of N. Y.* v. 1. p. 234.) gives double costs in suits against sheriffs, &c. only where a verdict is given for the defendant, or the plaintiff becomes nonsuited, or suffers a discontinuance.

In the present case, the cause has not been tried, nor has the party become nonsuit or discontinued.

(a) See *Rider v. Hubbell*, 4 Wend. Rep. 201.

ALBANY,
August, 1868.BROWN
v.
CLARK.BROWN *against* CLARK.

GOLD, for the defendant in error, moved for a *venire de novo* to be awarded in this cause, or that the record be remitted to the Court of Common Pleas of the county of *Oneida*, with directions to issue a *venire de novo* in that court.

It appeared that *Brown*, the plaintiff in error, had recovered judgment in the Court of Common Pleas of *Oneida*, against the defendant in error, on which a writ of error was brought to this court, on a bill of exceptions; and that the judgment was reversed at the last term. The bill of exceptions was merely to the opinion of the court below, in admitting a note in evidence, and did not relate to the merits of the cause.

*The counsel cited *Doug.* 696. 2 *Term Rep.* 53. 125. 2 *Saund.* 38. note 27.

Sedgwick, contra.

Per Curiam. In judgment of law, the *record itself* is removed into this court, from the Court of Common Pleas, though, in fact, a transcript only is sent up here. This court, therefore, has power to award a *venire de novo*, returnable at a circuit court, as was done in the case of *Grant v. Astle*, (*Doug.* 722.) and as was admitted to be the rule, by Lord *Mansfield*, in the case of *Harwood v. Goodright*, (*Cowper*, 89, 90.)

The case of *Davis v. Pierce*, (2 *Term Rep.* 125.) is very much in point, as the writ of error there was on a bill of exceptions from a court in *Wales*, as to the admission of evidence. The reasons given in that case are conclusive in favor of the propriety and justice of granting a *venire de novo* in cases where the demand is cognizable in this court. But in the present case, as there is every reason to believe, that the plaintiff would not recover a sufficient sum to entitle him to costs, but would be obliged to pay costs, it can be of no benefit, but an injury to him, to grant the motion, and which, for that reason only, is denied.

Rule refused.

(a) See *Flower v. Allen*, 5 *Cow. Rep.* 668.

On the return of a writ of error from a court of common pleas to this court, the record itself is removed, and this court, on a reversal of the judgment below, may award a *venire de novo* returnable at the circuit. (a) But where it appeared that the

[* 444]
sum demanded by the plaintiff was so small, that the plaintiff, if he recovered, would be obliged to pay the costs, the court refused to grant the *venire de novo*

ALBANY,
August, 1808.

WALSH
v.
HILL.

*REYNOLDS against LAMMOND.

Where the defendant in a cause has enlisted as a soldier in the army of the United States, the court will not grant leave to discontinue without paying costs, if it appear that the sum to be recovered is more than 20 dollars.

CRARY, for the plaintiff in error, moved for leave to ~~dis~~ continue in this cause, without paying costs. He read ~~a~~ affidavit, stating that the defendant had no property, real ~~no~~ personal, and that he had, on the 26th July last, enlisted in ~~the~~ army of the United States, for five years. The present ~~sui~~ it was brought to reverse a judgment obtained against the plaintiff in error, before a justice of the peace. He cited *Lackey & Briggs v. M'Donald*, (1 *Caines*, 116.)

Allen, contra. In the case cited, the defendant was ~~sen~~ sentenced to imprisonment for life. The judgment to be rendered in this case, would amount to more than 20 dollars, so that ~~the~~ defendant would be liable to be taken in execution, notwithstanding his being a soldier in the army of the United States.

Per Curiam. As the sum to be recovered in this case, ~~may~~ amount to more than 20 dollars, there is no reason for ~~granting~~ the motion. The act of Congress only declares that non-commissioned officers and privates shall not be arrested or taken in execution, for debts under 20 dollars, contracted before enlistment. (*Laws U. S. v. 6. p. 17. § 23.*)

Rule refused -

[* 446]

*WALSH against HILL, jun.

On a motion for a judgment as in case of nonsuit, the affidavit must state in what county the venue is laid.

JOHNSON, for the defendant, moved for judgment ~~as~~ in case of nonsuit, for not proceeding to trial.

Sedgwick, contra, objected that the affidavit, on which ~~the~~ motion was founded, did not mention where the venue ~~was~~ laid.

Per Curiam. The affidavit ought to mention in what ~~county~~ the venue is laid, so that the court may know whether ~~the~~ plaintiff could have brought the cause to trial since the ~~iss~~ ~~ue~~ was joined.

Rule refused -

ALBANY,
August, 1808.MINTURN and
CHAMPLIN
v.
PHELPS.MINTURN and CHAMPLIN *against* PHELPS.

A JUDGMENT was obtained in this cause, in *May*, 1807. A *ca. sa.* was issued to the sheriff of the city and county of *New-York*, on the 14th day of *July*, 1807, which was returned in *August*, not found. The defendant was regularly surrendered by his bail in *Ontario* county, on the 4th of *August*, 1807, and has since remained in custody. A rule was granted by the recorder of *New-York*, for the plaintiffs to show cause before him on the 9th day of *July* last, why a *supersedeas* should not issue to discharge the defendant, as he had been in custody above three months, on the surrender, without being charged in execution. On the day appointed to show cause, the plaintiff's attorney issued a *ca. sa.* directed to the sheriff of *Ontario* county, and enclosed it to him in a letter, which was put into the post-office, in the city of *New-York*, before the hour at which cause was to be shown. At the hour appointed, the parties appeared, and the plaintiffs showed for cause, that a *ca. sa.* had been actually issued against the defendant, and sent to the sheriff of *Ontario* county; *on which the judge refused to grant the *supersedeas*. On an appeal from this decision to the court, a motion was now made, on the above statement of facts, for a *supersedeas*.

Where the defendant, having been surrendered by his bail, and lain more than three months in prison, without being charged in execution, obtains a rule to show cause why a *supersedeas* should not be awarded, if the plaintiff, after service of the rule, and before the time assigned to show cause, charges the defendant in execution, he may show that for cause, and [* 447] it will be sufficient to prevent a *supersedeas*.

Harrison, for the plaintiffs.

Johnson, for the defendant.

Per Curiam. In *Brantingham's* case, (*Cole. Cases*, 42. *July* term, 1796.) the plaintiff, after an application for a *supersedeas*, and before the time of appearance before the judge, charged the defendant in execution, and then, on the hearing, showed that for cause; and all the judges held it to be sufficient. They were of opinion that the intent of the statute was to enable the defendant to put the plaintiff to his election, either to take the person of the defendant in execution, or to resort to his estate. The present case comes within the reason of that decision. The court are, therefore, of opinion, that the *supersedeas* ought to be refused.

Rule refused.

ALBANY,
August, 1808.

WHITE
v.
LOVEJOY.

KENT *against* DODGE.

The defendant may move to change the venue after issue joined, and at any time, where there has been no loss of trial, and no delay will be produced. (a)

S. S. LUSH, in behalf of the defendant, moved to change the venue in this cause.

Z. R. Shepherd, contra, objected, that the application ought to have been made before plea pleaded, or at least at the next term after issue was joined.

Per Curiam. It has been decided, that the defendant may move to change the venue after issue has been joined; (*Delavan v. Baldwin*, 3 *Caines*, 104.) and this may be done at any time, where there has been no loss of trial, and no delay will be produced. Take your rule.

Rule granted.

(a) *Chapin v. De Groff et al.* 4 *Cow. Rep.* 554

* 448]

*WHITE *against* LOVEJOY.

Where a *feri facias*, after it had been levied, was burnt by accident in the house of the deputy-sheriff, the court ordered a new *feri facias* to be made out and delivered to the sheriff.

A *FIERI FACIAS* was issued in this cause, and levied on the goods of the defendant, and afterwards, before a sale of the goods, it was burnt with other papers by an accidental fire, which consumed the house of the deputy-sheriff.

N. Williams, for the plaintiff, now moved that a new *feri facias*, similar to the one destroyed, might be made out and delivered to the sheriff.

Per Curiam. Take your rule for a new *feri facias* to be made out, *nunc pro tunc*. (a)

Rule granted.

(a) See *Chichester v. Cande*, 3 *Cow. Rep.* 39, and the cases cited at page 42 *Low v. Little*, 17 *Johns.* 346.

ALBANY,
August, 1808.

PELL and PELL, Assignees of the Sheriff, &c., *against*
JADWIN and others.

BRIGGS
v.
BRIGGS.

FOOT, in behalf of the defendants, moved to set aside the proceedings in this cause for irregularity.

Sedgwick, contra, objected, that the affidavits ought not to be received, as they were entitled in the suit on the bail-bond, and not in the original action.

On a motion to set aside proceedings in a suit on the bail-bond for irregularity, the affidavit is well entitled in the bail-bond suit.

Per Curiam. The papers are well entitled, and the defendant may take the rule on the usual terms.

Rule granted.

*BRIGGS *against* BRIGGS.

[* 449]

SHERWOOD, for the defendant, moved to set aside an inquest taken by default in this cause, on an affidavit, which stated that an inquest had been taken by default, &c., and that the defendant had "a good and substantial defence in the cause."

On a motion to set aside an inquest taken by default, an affidavit that the defendant has a good and substantial defence in the cause, is a sufficient affidavit of merits

Sedgwick, contra, objected, that there was not a sufficient affidavit of merits. He cited *Jackson*, ex dem. *Russel*, v. *Stiles*, (3 *Caines*, 93.)

Per Curiam. In the case of *Jackson*, ex dem. *Russel*, v. *Stiles*, there were peculiar circumstances, though not fully reported, which afforded strong reason to believe that there was really no defence on the merits, and that delay was the only object of the defendant. A *good* and *substantial* defence must mean a defence on the merits.

Rule granted.

ALBANY,
August, 1808.

VARIAN
v
OGILVIE.

THE PEOPLE *against* DUELL.

If a prisoner confined in the county prison on a conviction of petit larceny, break prison, it is a felony for which he may be sentenced to imprisonment in the state prison, for a period not exceeding fourteen years.

THE prisoner was convicted at the last *Oyer and Terminer* in the county of *Saratoga*, of breaking the gaol, in which he was confined for *petit larceny*, under a sentence of the *General Sessions* of the Peace, and enabling another prisoner also to escape who was in prison on a charge of felony.

The prisoner was brought up on a *habeas corpus*, to receive the sentence of the court.

The Court. A breach of prison, by a person in gaol on a charge of felony, is itself a felony above the degree of *petit larceny*, and punishable by imprisonment in the state prison, for a period not exceeding 14 years. The court sentence the prisoner to an imprisonment in the state prison for four years.

[* 450] *VARIAN *against* OGILVIE, *Gent.*, one of the Attorneys, &c.

Where a judgment is obtained against an attorney in this court for less than 250 dollars, the plaintiff is, nevertheless, entitled to full costs.

THE plaintiff having recovered a verdict against the defendant, one of the attorneys of this court, for 210 dollars, a question was raised, whether the plaintiff was entitled to full costs.

Per Curiam. It has been decided, in the case of *T. Bailey*, that where a judgment is recovered against an attorney of this court, for less than 250 dollars, the plaintiff is, nevertheless, entitled to full costs.

ALBANY
August, 1808.OTIS
V.
HALL.OTIS *against* HALL.

THIS was a special action on the case, for overflowing the plaintiff's land, by means of a mill-dam erected by the defendant on his own land. The defendant pleaded not guilty, and gave notice that he should offer evidence that the dam was erected by permission of the plaintiff.

At the trial of this cause, at the last circuit in *Lewis* county, the defendant proved that he had the permission of the plaintiff to erect the dam, and overflow his land, if necessary, for the use of the mill. The plaintiff proved a subsequent revocation of the license, and the jury found a verdict for the plaintiff for nine dollars damages.

The judge before whom the cause was tried refused a certificate, so as to entitle the plaintiff to full costs, and *Gold* now moved for full costs.

Platt, contra.

Per Curiam. The only question is, whether the plaintiff is entitled to full costs, within the proviso of the 4th *section of the act concerning costs, which declares that the limitation in that section shall not extend "to any action where the freehold or title to lands or tenements shall in any wise come in question." We are of opinion, that the freehold or title to the plaintiff's land did not come in question, within the purview of the statute. This case bears no analogy to that of *Heaton v. Ferris*, (1 *Johns*. 146.) Here was no claim of a right of entry into the plaintiff's land, nor of any direct use or enjoyment of it. The defendant merely sets up a right to use his own land, in the manner he has done, by erecting the dam; that any consequential injury to the plaintiff was waived by his express license for that purpose; and that it was a mere *damnum absque injuria*, for which the plaintiff had no right of action. The statute applies only to cases where a claim or question as to the direct use by entry on another's land comes in controversy. This and many other cases of consequential injuries, as for nuisances erected on the defendant's own land, do not in any manner bring the title in question. Nor does the setting up a lease or license by the plaintiff raise a question as to the title, or give any right or interest to the plaintiff's land.

In an action on the case for overflowing the plaintiff's land by means of a mill-dam on the defendant's land, the defendant pleaded, not guilty, and gave in evidence that he had the permission of the plaintiff to erect the dam, and overflow the plaintiff's land, if necessary. The plaintiff proved a revocation of the license, and the jury found a verdict in his favor for nine dollars damages. It was

[*451]

held, that the freehold or title of the land did not come in question, so as to entitle the plaintiff to full costs under the statute.

Rule refused.

ALBANY,
August, 1808

BAILEY
v.
CALDWELL

BAILEY and VOORHEES *against* CALDWELL.

An order of a judge to stay proceedings in a cause, and a certificate of probable cause, are the same in effect, and require the same practice as to the service of a notice of motion and copies of

[* 452]
affidavits, in order to prevent further proceedings.

JOHNSON, for the defendant, moved to set aside the inquest taken by default in this cause, and all subsequent proceedings, and that the money levied on the execution and received from the defendant, should be refunded, with costs. The cause was noticed for trial at the last *April* sittings in *New-York*, and an inquest was taken by default in the cause, out of its order on the calendar, of which the defendant's attorney had no notice, until served with a copy of the costs, on the 16th of *May*, when he offered to pay the costs, if the plaintiff's attorney would *waive the default. On the 17th of *May*, he obtained a judge's order for the stay of all proceedings in the cause, until the 4th day of this term, on the usual affidavit of merits, and that the inquest was taken by default, out of its order. A copy of the order was duly served on the plaintiff's attorney on the same day, but was not accompanied with a notice of a motion to set aside the default at this term, or copies of the affidavits, which were not served until the 22d of *July*. The plaintiff's attorney proceeded and entered up judgment in the cause, and on the 27th of *May*, the defendant was taken in execution, and paid the amount of the debt and costs to the sheriff.

It was contended, on the part of the defendant, that the order of the judge on the 17th of *May*, being absolute, was sufficient to stay all proceedings, without being accompanied with the notice of a motion and copies of the affidavits; and that there is a distinction between an absolute order of a judge for the stay of proceedings, and the certificate of probable cause mentioned in the 4th rule of *January* term, 1799; that these certificates were introduced by that rule, instead of the former mode of obtaining a rule against the opposite party, to show cause at the next term why the proceedings should not be set aside, and did not prevent a judge from arresting all further proceedings in the cause, by an absolute order. That the authority of a judge to grant such orders at his chambers was well established. (14 *Vin. Ab.* 581. *Judges* I. in notes. *Burr.* 2527. 2 *Hawk.* 6. 2 *Sellon's Pract.* 411. 462. *Caines*, 148. 152.)

Sedgwick, contra.

Per Curiam. The distinction stated between a judge's order to stay proceedings, and a certificate of probable cause, has never been made by the judges, who have, in practice, co-

considered them the same, and have used either form indifferently. An order in the form in which the one was granted in this cause, (a) has always been considered *as having the same effect as a certificate of probable cause, and as requiring the same practice, under the 4th rule of *January* term, 1799. The attorney of the plaintiff took the inquest in this cause at his peril; and as there is the usual affidavit of merits, and no *laches* is to be imputed to the defendant, it must, with the subsequent proceedings, be set aside with costs. Let the rule be taken for that purpose, and that the plaintiffs refund and pay over to the defendant the money received on the execution, with the sheriff's fees and costs.

ALBANY
August, 1808
BAILEY
v.
CALDWELL.
[* 453]

Rule granted.

(a) The order was in the following form :
 "C. & C. }
 adsm. }
 .B. & V. } Let all proceedings in the above cause be stayed until the fourth day in
 the next *August* term of this court. *May* 17th, 1808 "

END OF AUGUST TERM

34

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN NOVEMBER TERM, IN THE THIRTY-THIRD YEAR OF OUR
INDEPENDENCE.

JACKSON, *ex dem.* REILEY and others. *against*
LIVINGSTON.

If a party conceiving himself aggrieved by the award of the Onondaga commissioners, has given them notice of his dissent, within two years, that is sufficient to prevent his being concluded [* 456] by the award, whether the commissioners have entered such dissent in their book of awards, or not. What amounts to such notice is a fact for the jury to decide.

THIS was an action of *ejectment*, for a part of lot No. 3, in the town of *Hector*, in the county of *Seneca*. The cause was tried at the *Seneca* circuit, on the 23d June, 1807, before Mr. Justice *Tompkins*.

At the trial, the lessors of the plaintiff produced the book of awards made by the commissioners, appointed to settle disputes concerning titles to land in the county of *Onondaga*, and which had been duly filed in the office of the clerk of the county of *Cayuga*, pursuant to the directions of the act. By this it appeared that the commissioners *awarded the lot in question to *John Lawrence*, one of the lessors of the plaintiff, in fee, on the 12th March, 1801; and their award was duly entered under their hands and seals in their book.

The defendant offered in evidence a dissent in writing of *Birdsey Norton* to the award of the commissioners, made the 28th day of August, 1802, on which was endorsed, "filed October 1st, 1802;" and the clerk of *Cayuga*, who produced the paper, testified that he found it on the files when he came into office, in January, 1804, when the papers were delivered to him by the former clerk; that there were two bundles of dissents on file in the office, one of which was deposited by the clerk of the commissioners, and a note of the time of their

being received was entered in the book of awards, which he had compared and found to be correct; the other bundle of dissents was received by him from his predecessor in office, and no note or entry of them was made in the book of awards.

NEW-YORK,
Nov. 1806.
JACKSON
V.
LIVINGSTON

Vincent Matthews, Esq., one of the commissioners, testified, that an endorsement on the paper containing the dissent of *Norton*, in the words following, "*Birdsey Norton's* dissent from an award of lot No. 3, in *Hector*, 28th August, 1802," was in the hand-writing of *James Emott*, Esq., the other commissioner; that all the dissents received by the commissioners were retained by them until they filed the book of their awards, and were all entered in the book of awards, and delivered with the book to the clerks of the counties of *Cayuga* and *Onondaga* respectively.

It further appeared, that there was no entry or note of any dissent from the award of lot No. 3, in question, in the book of awards. (a)

The counsel for the plaintiff objected to the writing or paper containing the dissent of *Norton*, being read in evidence; and it was rejected by the judge. The defendant then offered to prove that *Norton*, at the time of the award of the commissioners, was in possession of the premises in question, and to deduce a regular title and continued possession from the first patentee to himself; but this evidence being objected to, was excluded by the judge; and the jury, under his direction, found a verdict for the plaintiff.

[* 457

The defendant moved for a new trial,

1. Because the evidence of the dissent ought to have been admitted.
2. Because the evidence of the title offered by the defendant ought not to have been rejected.

E. Williams, for the defendant. The lessors of the plaintiff found their claim on the award of the commissioners, and have shown no other title; but the defendant, having entered his dissent, and regularly filed it with the commissioners, cannot be bound by their award. The act provides, that any person conceiving himself aggrieved by the award of the commissioners may, within two years, give notice to the commissioners of his dissent from the same, or file such dissent in the office of the clerk of the county of *Onondaga*. When the county of *Onondaga* was afterwards subdivided, and a part thereof erected into a new county, by the name of *Cayuga*, it was the practice to file the dissents in the office of the county in which the lands were situated. It was enough that notice

(a) See 3d section of the act, passed 24th March, 1797, 20 sess. ch. 51. (*Greenleaf's* edition of the laws, v. 3. p. 425.)

NEW-YORK,
Nov. 1808.
JACKSON
V.
LIVINGSTON.

of this dissent was given to the commissioners, within the time prescribed, and whether they entered it in their book or not, the omission cannot prejudice the defendant, who has complied with all the directions of the act. As the defendant was in possession at the time, it was the duty of the plaintiff to bring his action within three years, though the award was in his favor.

[* 458]

Mumford, contra. The only question is, whether the defendant has filed his dissent agreeably to the directions of the act, for the party in whose favor the award is made is not bound to bring an action unless a dissent has been filed. The act expressly directs that it must be filed *in the county of *Onondaga*. It cannot be filed elsewhere. Though there is an endorsement in the hand-writing of one of the commissioners, yet he has not marked it, as filed with him; nor does it follow that notice was in fact given to the commissioners according to the act.

VAN NESS, J., delivered the opinion of the court. The evidence of the dissent of *B. Norton* from the decision of the commissioners, offered at the trial, ought to have been admitted. Whether the dissent mentioned in the case, was delivered to the commissioners or not, was a matter of fact proper to be left to the jury; and it is agreed that if it was delivered to them, the title to the lot in question is now open to investigation. The party dissenting is required to give notice thereof to the commissioners, or to file his dissent in the office of the clerk of the county of *Onondaga*; and in case he adopts the former course, the commissioners are required to make an entry of it in their book of awards. If such notice has been given to the commissioners, and they have not made the proper entry, the party ought not to be prejudiced by their omission. He was not to see that the entry was made, and his rights cannot be impaired by the non-performance of an act by a third person over whom he had no control, and which act he was under no obligation to see executed. The dissent in question was filed in the clerk's office of *Cayuga* as a public document; the endorsement on it was in the hand-writing of one of the commissioners, and must, therefore, have been in his possession, and the contents of it known to him. These facts, uncontradicted and unexplained, afford strong evidence of a notice to the commissioners, by *Norton*, of his dissent from their decision. To avoid this conclusion, the plaintiff relies on the testimony of Mr. *Matthews*, one of the commissioners, who says, that all the dissents delivered to them, were entered in the book of awards. This must, however, be understood, as the witness probably intended it should be, with some limitation. He is speaking of a transaction, all the details of which could not be

perfectly in his recollection. *The most that can be made of his testimony is, that it was the general practice with the commissioners to make an entry of the dissents delivered to them, but that, in some cases, there may have been omissions. Thus explained, it would not materially affect the testimony on the other side. It has been contended, that after the county of *Cayuga* was erected, this dissent might be filed in the clerk's office of that county, but it is not requisite that we should now express any opinion on that point.

The court are of opinion, that, upon the first ground, there ought to be a new trial, with costs to abide the event of the suit.

New trial granted.

NEW-YORK,
Nov. 1808.

JACKSON
V.
BROWN.

JACKSON, *ex dem.* ANTELL and Wife, against BROWN.

THIS was an action of *ejectment*. The cause was tried at the *Herkimer* circuit, in 1807, before Mr. Justice *Van Ness*. The lessors of the plaintiff claimed 65 acres of land, off the north end of great lot No. 10, in *Glen's* purchase, of which the defendant was in possession.

The premises in question are comprehended in 375 acres of land, which belonged to the heirs of *Alexander Colden*, deceased, being six in number, as tenants in common. In *February*, 1805, a petition for the partition of the land was made, of which due notice was given for the ensuing *May* term, according to the statute, to *Cadwallader R. Colden*, as entitled to one third part; and some of the co-tenants residing out of the state, the petition and notice were duly published, as the act directs. It appeared that on the 8th *July*, 1802, *Cadwallader R. Colden* had sold and conveyed to the defendant all his undivided share and interest in the land so held in common; but the defendant was not named in the petition, nor was any notice thereof given to him. As *Cadwallader R. Colden* did not appear, judgment of partition was rendered in *February* term, 1806, by which the premises in question were set off and assigned to one of the lessors of the plaintiff. The defendant resided on part of the land, at the time of the partition, and claimed to hold possession of the premises under the deed from *C. R. Colden*.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case containing the facts above stated.

Where one of several tenants in common had aliened his share, and the plaintiff in partition proceeded as if no such alienation had been made, by giving notice to the original co-tenant, without taking notice of the grantee, the judgment in partition was held to be void. In an action of *ejectment*, the plaintiff relied on the judgment of partition only, and it was

[* 460] held, that he could not, in such case, recover his undivided share without producing a regular title, as if no such judgment of partition had been rendered.

NEW-YORK
Nov. 1808.

JACKSON
v.
BROWN.

Two questions were raised for the consideration of the court.

1. Whether the want of notice to the defendant, to whom one of the co-tenants had conveyed previous to the petition, avoided the partition.

2. If the partition was void, were not the lessors of the plaintiff entitled to recover an undivided share, as tenants in common?

Gold, for the plaintiff. If the objection of the defendant of a want of notice is to prevail, it may produce much inconvenience. Co-tenants may aliene, a day before the judgment in partition, which may be thereby defeated; for the statute contains no provision for such alienations. The act binds parties and their legal representatives, and the defendant may be considered as the legal representative of *C. R. Colden*. The proviso in the supplementary act does not avoid the partition, in relation to parties not named in the partition, but declares that they shall not be concluded from controverting the interests of the parties who apply for the partition. Again, as the petition and notice to the other tenants were published in the *gazette*, this ought to be considered as sufficient notice to the defendant. But if the partition was not valid, the lessors of the plaintiff are entitled to recover one undivided sixth part, as one of the heirs of *Alexander Colden*; and this would be perfectly consistent with the deed to the defendant, which is only for the undivided interest of *C. R. Colden*.

[* 461] **Griswold*, contra. The plaintiff ought to have shown a regular title; but he produced only a judgment of partition, and if that is void, he must wholly fail. The supplementary act provides for the difficulty which has been suggested, by directing a particular mode of proceeding, where any of the tenants in common are unknown to the party applying for a partition. The defendant was the party in interest, and entitled to notice. As the plaintiff has failed in proving any such notice, or that he has proceeded according to the act, he cannot recover.

YATES, J., delivered the opinion of the court. Two questions arise in this cause.

1. Whether the want of notice to the defendant, being a co-tenant, does not avoid the partition.

2. If the partition cannot be maintained, whether the lessors of the plaintiff, or either of them are, notwithstanding, entitled to recover an undivided part, as tenants in common.

By the first section of the act for the partition of lands, passed the 7th April, 1801, (*Laws N. Y. v. 1. p. 542.*) it is directed that a copy of the petition shall be served, 40 days previous to the term in which the same shall be presented to

the court, on all parties concerned, who shall not join in such petition, and shall reside in the state, together with a notice subscribed by the petitioners, and directed to the party, that an application will be made to the court for the appointment of commissioners to perform the duties stated in the act. By a supplementary act, passed the 9th April, 1804, (*L. N. Y.* p. 239.) relief is given to tenants in common, where any of their co-tenants, and the extent of their interest in the premises, are not known, by making it the duty of the court, on a suggestion of the facts, supported by an affidavit, to direct a publication, and the form thereof. These being express provisions by statute, this court cannot dispense with them, by any intendment.

NEW-YORK,
Nov. 1808.

JACKSON
V.
BROWN

The personal service of the notice on *Cadwallader R. Colden*, who had previously parted with his interest to the defendant, who resided in the state, cannot be deemed a sufficient service. The defendant was entitled to personal notice under the statute, unless the parties had complied with the provisions contained in the supplementary act. This has not been done; no such suggestion appears in the proceedings of the partition, either by affidavit or otherwise.

[* 462]

There can be no doubt that the parties petitioning considered *C. R. Colden* as possessing the share originally held by him, and had no knowledge of the defendant's interest. This, however, cannot affect the right of the defendant under the act; and the omission to comply with its directions in bringing the defendant properly into court, so as to make him a party, renders the proceeding wholly inoperative, and, consequently, destroys any right the lessors might otherwise have under the partition.

It does not appear that any title was produced, except what appeared from the proceedings of the partition. As these were void, for the reasons already mentioned, the lessors of the plaintiff have not made out their claim to any part of the premises.

The court are, therefore of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

NEW-YORK.
Nov. 1808.

PARSONS
v.
Adm'rs of
GAYLORD.

***PARSONS, Assignee of FRELIGH, an insolvent Debtor
against The Administrators of GAYLORD.**

C. gave his bond to B. for a certain sum of money, on the payment of which B. agreed to convey a certain quantity of land to C. B. delivered the bond to F. with an authority to receive the money; and C. with G. as his surety, gave a joint and several note to F. for the amount of the bond, which was given up to C. In an action on the note against G., it was held, that he could not set up as a defence an agreement by F. that in case B. should refuse to consider the note as a payment on the bond, it should be returned, nor a want of consideration, by reason of the failure of B. to convey the land to C.

THIS was an action of *assumpsit*. The cause was tried at the *Herkimer* circuit, the 3d October, 1807, before Mr. Justice *Van Ness*.

The declaration was on a joint and several promissory note, dated the 18th December, 1798, for 162 dollars and 63 cents, made by the intestate, *Gaylord*, and one *Owen Carmer*, payable to *Michael Freligh*, or order, on the 1st November, 1799.

It appeared from the evidence, at the trial, that *Carmer* had given his bond to one *Bartlett*, for the consideration-money agreed to be paid, on the purchase of a parcel of land, and on the payment of which, the land was to be conveyed to him by *Bartlett*. *Bartlett*, being indebted to *Freligh* by bond, in a larger amount, delivered to him the bond of *Carmer*, with a written authority to receive payment, and an order on *Carmer* to pay the amount to *Freligh*. The intestate joined with *Carmer* in the note in question, and the amount due to *Bartlett* was endorsed by *Freligh* on the bond of *Carmer*, and the bond itself delivered up to *Carmer*.

Some of the witnesses testified, that at the time the note was given, *Carmer* and the intestate expressed an apprehension that *Bartlett* would not consider the note as a payment on the bond against *Carmer*, and that *Freligh* said, if *Bartlett* was dissatisfied and should refuse to consider the note as a payment on the bond, that he, *Freligh*, would then give up the note to the intestate and *Carmer*, and that on this assurance from *Freligh*, they signed the note. *Bartlett* afterwards declared his dissatisfaction, and refused to consider the note as payment; and went with the intestate and *Carmer*, and demanded the note of *Freligh*, who refused to deliver it up, saying that the intestate and *Carmer* should not be hurt by it. This testimony, however, was contradicted by other witnesses.

[* 464]

*It appeared also, that *Bartlett* had become bankrupt, and could give no title for the land to *Carmer*. The judge charged the jury, that if the latter witnesses were to be believed, the plaintiff was entitled to recover, and the jury accordingly found a verdict for the plaintiff.

A motion was made in behalf of the defendant to set aside the verdict, and for a new trial:

1. Because the verdict was against evidence.
2. For the misdirection of the judge.

Cady, for the plaintiff.

Hildreth, Attorney General, contra.

NEW-YORK
Nov. 1808.

PARSONS

v.

Adm'rs of
GAYLORD

SPENCER, J., delivered the opinion of the court. The defendant insists, that the consideration of the note on which the present suit is brought, has failed, because *Bartlett*, with whom *Carmer*, one of the makers of the note, had contracted for the purchase of a piece of land, refused to consider the note as a payment on the bond given for the land, and had become a bankrupt, and wholly unable to convey a title for the land pursuant to his contract.

There is a contrariety of evidence, as to what passed when the note was given; and the jury, without deciding on the credit of the witnesses, have given a verdict under the direction of the judge, who considered the evidence of an agreement to give up the note, and of *Bartlett's* refusal to admit it in payment, as irrelevant. It is necessary, therefore, to inquire merely whether the agreement set up by the defendant can operate as a defence in this action. It is clear that the giving the note by *Carmer* and his taking possession of the bond, under the authority given by *Bartlett* to *Freligh*, amounted in law, to a payment, and any dissent of *Bartlett* afterwards, must be unavailing. The agreement that *Bartlett* should allow the note as a payment, was in effect performed, since he could not legally disallow it; and his subsequent dissent, after he was thus concluded by the acts of his agent, was vain and idle. *Carmer* had also in his possession the *fullest evidence to show that he had paid, as between him and *Bartlett*, what he was bound by his bond to pay.

[* 465]

The subsequent bankruptcy of *Bartlett* cannot affect or vary the case. If *Carmer* chose to part with his money, before he acquired a title for the land, it was a want of caution on his part, for which he must blame himself.

The court are, therefore, of opinion, that the direction of the judge was correct, and that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

NEW-YORK,
Nov. 1808.

TAPPEN
v.
VAN WAGENEN.

TAPPEN *against* VAN WAGENEN.

Where, on the return of *non est inventus*, on the *ca. sa.* against the principal in a suit, the bail gave a note for the amount of the judgment, which was afterwards reversed on a writ of error, it was held, that as the bail was not fixed, and the judgment was reversed, there was a failure of the consideration of the note, and the plaintiff was not entitled to recover.

THIS was an action of *assumpsit*. The plaintiff declared on a promissory note, dated the 17th September, 1806, for 171 dollars and 39 cents, payable on the 1st November, thereafter. The defendant pleaded *non assumpsit*, with notice of special matter to be offered in evidence at the trial.

On the trial of the cause, the defendant proved, that he was special bail for one *Teunis Remsen*, at the suit of one *Abraham Morris*, in an action pending in the Court of Common Pleas of Ulster county, in which a judgment was rendered against *Remsen* in the term of July, 1806, and that the note in question was given by him for the amount of that judgment. A writ of error was brought to this court to reverse the judgment. There was an assignment of errors and a joinder thereon, as of August term, 1806, and the judgment was reversed in November term following. Notice of the writ of error was given to the plaintiff on the 27th September, 1806. The *ca. sa.* issued on the judgment below, was tested the 5th July, 1806, and returnable on the third Tuesday of September, thereafter, and was filed in the clerk's office the 16th September, with the return of *non est inv.* endorsed thereon. It was admitted that the judgment of reversal was obtained, after joinder in error, *by default. The present suit was commenced in the vacation preceding the term of May, 1807.

The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case, containing the facts above stated.

Fisk, for the plaintiff. The only ground on which the defendant can avoid the payment of the note, is that the consideration has failed. The condition of the recognizance entered into by the defendant was, that he should surrender the principal, or pay the consideration-money and costs. As he did not surrender the principal, he was liable to a suit on the recognizance. To avoid the expense and trouble attending such a suit, he elected to give his note for the amount of the judgment. The liability of the defendant, and the costs of a suit, were a sufficient consideration for the note. The defendant was fixed in law, as bail, on the return of the *ca. sa.* against the principal, on the 16th September; and having voluntarily given his note to avoid the consequences of that liability, he cannot be permitted to avail himself of the proceedings of the principal, afterwards, or of the subsequent reversal of the judgment.

Sudam, contra. Bail are entitled to eight days in full term, after the return of the *ca. sa.* against the principal, and this is a matter of right. (2 *Johns. Rep.* 101.) The defendant, therefore, could not be fixed, until the term of *January*, 1807, and the judgment was reversed in the *November* preceding. If a writ of error be allowed before the bail are fixed, it is a *supersedeas*. (3 *Term Rep.* 390. 2 *Sellon*, 128. 2 *Str.* 867. 1 *Wilson*, 16.) As the time when the *ca. sa.* was actually issued is not stated, it may be presumed to have been subsequent to the allowance of the writ of error. The consideration of the note was the judgment against the principal; and as that was reversed before the bail were fixed with the payment of it, there has been a failure of the consideration, and the plaintiff cannot be entitled to recover.

NEW-YORK
Nov. 1808.
TAPPEN
V.
VAN WAGEN
NEN.

*VAN NESS, J., delivered the opinion of the court. It would be highly unjust for the plaintiff to recover. The defendant could not be made liable upon his recognizance, until the plaintiff had obtained judgment against the defendant in the original suit. It is true, that such a judgment was once obtained; but after the reversal, it was as if it had never existed. It would be absurd, therefore, that the plaintiff should be allowed to recover against the bail, when there is in fact nothing due to him from the principal; yet that is contended for in the present suit. The consideration of the note was the judgment against the principal. That judgment is no longer in existence, and thus the consideration of the note has wholly failed. The defendant here engaged to pay this note under a persuasion, that his principal was bound by the judgment. In this he was mistaken. The principal is not bound, and the bail must consequently be discharged. (*Taswell v. Stone*, 4 *Burr.* 2454.) If the defendant had paid this judgment after the reversal, he might have recovered the money back. If a suit had been brought on the recognizance, the court, pending the writ of error, would have stayed the proceedings until the writ of error had been disposed of. If there had even been a judgment in the suit upon the recognizance, and the original judgment had been reversed, the bail would be relieved on an *audita querela*. (Dr. *Drury's case*, 8 *Rep.* 142. Sir *John Applesby and Key v. Ive*, Cro. *Jam.* 645. *Jenkins's Rep.* 319. pl. 21. Sir *John Applesby's case*. *Green v. Legus*, 2 *Roll. Rep.* 254.)

The court are, therefore, of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

NEW-YORK,
Nov. 1808.

TOBEY
v.
WEBSTER.

*TOBEY against WEBSTER.

A lessor cannot maintain an action of trespass *quare clausum fregit* against a sub-tenant at will of the lessee, for taking down and carrying away a house erected by him on the leased premises, during the lease.

THIS was an action of trespass *quare clausum fregit*, and for taking and carrying away a house. The cause was tried at the *Greene* circuit, in *June*, 1805, before Mr. Justice *Thompson*.

The premises on which the trespass was alleged to have been committed, were leased on the 17th *November*, 1802, by the plaintiff, to one *Barber*, for two years. On the 26th *July*, 1803, *Barber* gave a writing to the defendant, granting him permission to occupy and improve the premises, as long as the defendant should remain in his (*Barber's*) employ, and to build an addition to the house of 14 feet square, and keep his cattle in the barn on the premises, free of rent. On the 19th *November*, 1803, *Barber* assigned his lease to one *Coffin*, who re-assigned it to the plaintiff, on the 27th *February*, 1804. The house in question was erected by the defendant, with materials cut on the premises, and was taken away on the 16th *February*, 1804, before the re-assignment of the lease to the plaintiff. The lease gave a permission to cut timber on the land, for the use of the mill. The defendant was a sawyer employed on the premises; and was employed by *Coffin*, after the assignment of the lease to him by *Barber*.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

E. Williams, for the plaintiff. I shall contend that a reversioner may maintain trespass for any injury done to the freehold, during the possession of the termor; and that where things are severed from the freehold and carried away, an action will lie, *de bonis asportatis*.

SPENCER, J. It was expressly decided in the case of *Campbell v. Arnold*, (1 *Johns. Rep.* 511.) that trespass would not lie by the lessor or owner of the land, while there was a tenant in possession.

[* 439]

*KENT, Ch. J. I was at first of a different opinion, but on looking into the cases, I was satisfied, that the plaintiff could not maintain an action of trespass, and concurred with the other judges in the opinion delivered. It is unnecessary to argue that point.

Williams. Then I shall endeavor to distinguish this case from that of *Campbell v. Arnold*. Here the plaintiff was re-

stored to his possession. A disseisee may maintain trespass after a reëntry, for any intermediate damage done to the freehold, for by his reëntry he is restored to his possession, *ab initio*. (3 *Bl. Comm.* 210. *Viner, Trespass*, T. 5, 6, 7. *ib.* N. 3, 4.) The defendant derived no interest in the premises from the plaintiff. He was a mere tenant at will to *Barber*. He had permission to build a house and occupy it, free of rent; but he had no authority to take it away. The fair inference from the writing given to him by *Barber*, is, that he was to leave the house on the premises. If such be the true interpretation of the agreement, then the defendant had no right to remove the house. (1 *Hen. Black.* 259.) *Barber* clearly had no right to build or remove any building, and could not, therefore, give any such right to the defendant. Again, when the house was pulled down, and severed from the land, the materials belonged to the plaintiff. Though a lessee for years may have an action of trespass against a stranger for cutting down trees, he cannot recover the value of the trees, for they are the property of the reversioner. (4 *Co.* 62, 63. *Co. Litt.* 57. *a.*) The materials of which the house was built did not belong to the defendant, and he had no right to take them away. The pulling down of the house was *waste*, and an injury to the freehold. The defendant was a *tort-feasor*, a wrong doer, and the proper remedy against him is *trespass*, and not trespass on the case. Though the lessee may have trespass against a man who subverts the land, the lessor also may have trespass for the *destruction* committed. (*Viner, Trespass*, N. 3, 4. *Cro. Car.* 187.) There is no distinction in this respect between a tenant at will, and a tenant for years. Again, the house was a *fixture*, and so annexed to the freehold, that the defendant could not remove it. (3 *East*, 38.)

NEW-YORK,
Nov. 1808.

TOBBY
V.
WEBSTER

**Frazier*, contra. It has been settled that no person out of possession, not even the heir at law, can maintain trespass *quare clausum fregit*. (6 *Bac. Abr.* 566.) The doctrine cited from *Viner* does not apply to this case, for as the plaintiff was not in possession, there cannot be a *disseisin*. The proper remedy for the plaintiff is an action on the case in the nature of waste. *Barber* had a right to cut trees for the use of the mill; and the defendant had permission to take the timber sawed at the mill, and to build the house. Having erected the house of his own materials, he had a right to remove it during the term, if he could do it without injury to the freehold. (*Bull. N. P.* 34. 1 *H. Black.* 256. *Lawton v. Salmon*, in notes.) There has been no destruction or waste committed, but the premises are left in the same situation in which they were at the time the lease was given to *Barber*. The defendant cannot be considered as a tenant at will; he was rather

[* 470]

NEW-YORK, a servant or agent under *Barter*, who was a lessee for
Nov. 1808. years.

TUBBY
v.
WEBSTER.

YATES, J., delivered the opinion of the court. An action of trespass may be maintained by a landlord against a tenant at will, for waste, because the injury determines the estate, and the possession considered as thereby actually in the landlord. The defendant here is an under tenant of a tenant for years; and the alleged trespass was committed before the expiration of the term. The instrument by which the defendant possessed the premises, made him a tenant at the will of the lessee for years, and not at the will of the original lessor; and if the lessee for years, his agents, or sub-tenants, did an injury to the freehold, the lessor might have his remedy against him or the person in default, in another form of action. The assignment or surrender of this lease to the original lessor, before the expiration of the term, does not give him a right to sustain this action. I should rather suppose that, by this assignment, having accepted the premises in the state and condition they were at the time of such surrender, he has waived all claim for injuries previously done to the freehold. But it is contended that this assignment and reëntry restores the possession *ab initio*, and gives him a right of action. This doctrine only applies in a case of disseisin. The reëntry in such case reduces the possession from the time of the first disseisin, and an action of trespass may be sustained; but here the possession of the defendant was lawful, founded on the original lease, and no disseisin is pretended. I cannot, therefore, distinguish this case from that of *Campbell v. Arnold*, where the court considered the rule as established, that there must be a possession *in fact* of the real property, to which the injury was done in order to entitle the party to an action of trespass *quare clausum fregit*.

The court are, therefore, of opinion, that the verdict ought to be set aside, and that a judgment of nonsuit be entered.

VAN NESS, J., having formerly been concerned as counsel in the cause, declined giving any opinion.

Judgment of nonsuit.

NEW-YORK
Nov. 1808.WALDRON
v.
M'CARTY.WALDRON *against* M'CARTY.

THIS was an action of *covenant*. The declaration set forth a deed, by which the defendant, on the 1st May, 1799, conveyed to the plaintiff, in fee, a certain parcel of land, and therein covenanted for himself and his heirs, "the premises thereby bargained and conveyed, in the quiet and peaceable possession of the plaintiff, his heirs and assigns, for ever to warrant and defend." The plaintiff then averred, that at the time of executing the deed to him, the premises were subject to, and encumbered with a mortgage, executed on the 1st May, 1790, by the defendant, to one Oothout, for securing the payment of 4521 dollars and 92 *cents, and that afterwards, by virtue of a decree of the Court of Chancery, the premises were sold at auction, for the principal and interest due on the mortgage; and that the plaintiff was obliged to purchase the premises, in order to prevent his being deprived and ousted of the same; and so, &c.

To this declaration there was a general demurrer and joinder.

Henry, in support of the demurrer. In an action of covenant, the plaintiff must set forth an eviction under a lawful title. (2 *Johns. Rep.* 1. 2 *Saund.* 177. n. 8. 10. 3 *Term Rep.* 587.) Should it be said that the decree of the Court of Chancery and sale are equivalent to an ouster, then it ought to have been shown that the plaintiff was a party to that suit, and bound by the decree. Further, the declaration does not state that the plaintiff paid any money, nor how much.

Van Vechten, contra. The covenant, for the breach of which this action is brought, is substantially a covenant for quiet enjoyment. Covenant will lie on a warranty in case of *fine*; (1 *Lev.* 301. 2 *Saund.* 180.) and it was decided in *Staats v. Ten Eyck*, (3 *Caines*, 111. 1 *Term*, 671.) that covenant would lie on a warranty for quiet enjoyment. The suit in chancery was a disturbance sufficient to support this action; (5 *Viner*, 161, 162. in notes. *T. Raym.* 370, 371.) and the decree and sale amount to an actual ouster by a lawful title. There is sufficient certainty in the assignment of the breach in the declaration. It was not necessary to state how much money the plaintiff had paid for the land. The breach or injury complained of is the disturbance by the mortgage, the decree in chancery, and sale. It is enough to state a superior

M. gave a deed of land to W., and covenanted that he would warrant and defend W. in the quiet and peaceable possession of the premises. At the time of the conveyance, there was a previous mortgage on the land, and a suit

[* 472] in chancery was afterwards brought by the mortgagee, and a sale of the premises decreed, and W. purchased the same at the master's sale, and then brought his action against M. for a breach of the covenant of warranty for peaceable enjoyment; and it was held, that an action could not be maintained on the covenant until there had been an eviction or actual ouster, by a paramount lawful title. (a)

(a) See *Kerr v. Shaw*, 13 *Johns.* 226. *Trustees of Newburgh v. Galatian*, 4 *Cow. Rep.* 343.

NEW-YORK,
Nov. 1808.

WALDRON

v
M'CARTY.

title which has been enforced to the disturbance of the plaintiff (4 *Term Rep.* 650, 651. 2 *Lev.* 37. 3 *Lev.* 305. 325. 2 *Saund.* 181. b. 1 *Term Rep.* 672. 2 *Shower*, 425.) It was not requisite for the plaintiff to show that he was a party to the suit; he does not undertake to set forth the decree, and all that can be required is, that the breach be laid with reasonable certainty. It was sufficient to state the suit in chancery, and the decree; for it is a necessary inference that all proper parties were before the court.

[* 473]

Henry, in reply. The warranty is of the peaceable possession and the plaintiff should show an eviction by the judgment of a court of law, or a paramount lawful title, by which the plaintiff has been turned out of possession. Suppose there had been a prior judgment against the defendant; and the premises had been sold under that judgment, that would not support this action, for the possession of the party would be still undisturbed. It does not follow, that because there was a decree of the Court of Chancery, that a writ of a *habere facias poss.* must have issued. The plaintiff ought to show that he was a party to the suit, and that he used all proper means to protect his possession; and it may be, if he had been a party, that he would have been relieved against the mortgage. It was requisite also, to set forth the sum paid by the plaintiff, in order to obtain a just measure of damages; and the defendant might have thought proper to pay it without a suit.

SPENCER, J, delivered the opinion of the court. The question submitted to our consideration is, whether, under the circumstances of this case, there is an eviction within the term or spirit of the covenant. After a full examination of the case relative to this point, and especially those cited on the argument, we do not find one, where an action of covenant has been brought on a covenant for quiet enjoyment, in which it is not expressly alleged, that there was an entry and expulsion from the possession, or some actual disturbance in the possession. The allegation of an entry and expulsion are so much of the essence of the action, that there are several cases in which issue is taken on that fact, notwithstanding, in those very cases a lawful title, superior to the one conveyed by the deed containing the covenant for quiet enjoyment, is alleged. (1 *Lev.* 301. 2 *Saund.* 181. b. n. 10.) In good sense, the covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title. In the present case judging from the deed, it was never the intention of the grantor to covenant, that the lands were free from encumbrance. From precedents, and as no authority has been shown, that the covenant for quiet enjoyment is broken by any other acts than

[* 474]

an entry and eviction, or a disturbance of the possession itself, we are of opinion that the demurrer is well taken. Whether there is any remedy by any other suit, or in any other court, is not for us to inquire. It is enough that we are satisfied that the remedy now sought is not such as the law affords.

The court are, therefore, of opinion, that the defendant must have judgment.

Judgment for the defendant.

NEW-YORK,
Nov. 1808.

BOUTON
v.
NEILSON.

BOUTON *against* NEILSON.

FROM the return to the *certiorari*, in this cause, it appeared, that Neilson was an overseer of the highways in and for district No. 6, in *Stillwater*, in the county of *Saratoga*, and according to the directions of the "act to regulate highways," passed the 3th April, 1801, (*Laws of N. Y.* v. 1. p. 588.) made a complaint in writing to the justice, that Bouton had neglected to work on the highways, &c. on the 16th October, 1806, according to the warning for that purpose, given to him by Neilson; upon which the justice issued a warrant against Bouton, to levy and collect of him 1 dollar, the penalty given by the act, and 25 cents for the warrant.

Proceedings under the 11th section of the "act to regulate highways," are to be in a summary way; the overseer is the judge of the delinquency of the party, and the justice, in issuing a warrant, acts ministerially, and is not bound to give the party notice of the complaint, or to summon him to appear, or show cause against the charge. (a)

Skinner, for the plaintiff in error. The defendant below was convicted on the mere complaint of the overseer, without being heard, or even cited to show cause why a warrant should not issue against him. It is contrary to every principle of reason and justice that a person should be convicted, without notice of any complaint against him. It is indispensable that the party accused should be *summoned* to appear, before he is condemned. (4 *Bl. Comm.* 236. 1 *Salk.* 131. 2 *Lord Raym.* 1405. *Strange*, 630. 5 *Term Rep.* 270. 7 *Term Rep.* 370. 3 *Burns's Justice*, 28.) Complainants in these cases are to be regarded as plaintiffs. The justice is to be considered as the judge, not as a mere ministerial officer to the overseer, who ought to state his complaint in writing, and furnish the necessary evidence to support it. In *Rue v. Sprague* and *Consaulis*, (1 *Johns. Rep.* 510. 3 *Caines*, 259.) there was a regular *process issued, and the court said, that actions for penalties under the act to regulate highways, must be brought in the name of

[* 475]

(a) See *The People v. Matthewson*, 20 *Johns.* 300.

NEW-YORK, the person complaining, and not be prosecuted in a summary way.
Nov. 1808.

BOUTON
v.
NEILSON.

Van Vechten, contra. This is a case of summary conviction. Nothing more was necessary than to pursue the directions of the act, in which nothing is said of notice to the party. This was a proceeding for a penalty under the 11th section of the act, which the court, in *Bennet v. Ward*, (3 *Caines*, 260.) admitted to be a case of summary conviction. The justice is required, on a complaint in writing from the overseer, forthwith to issue his warrant to a constable, directing him to levy the fine on the goods and chattels of the delinquent, and forthwith to pay the same to the justice, who is required to pay the same to the overseer. The office of the justice is merely ministerial; the overseer alone is the judge, and is bound under a penalty to make the complaint to the justice. This is not a proceeding under the act for the recovery of debts to the value of 25 dollars; and a *certiorari* is perfectly nugatory, for the fine levied is to be immediately laid out on the highway, and the overseer cannot be responsible after the money is expended nor can it be recovered of the justice, who is required by the act to issue his warrant and collect and pay over the money.

[KENT, Ch. J. This court has a general superintending power over all inferior courts, and may review and correct their proceedings, whether on a summary conviction or otherwise.]

Skinner, in reply, observed, that if a *certiorari* was not proper remedy in this case, a party aggrieved by these summary proceedings would be entirely remediless.

THOMPSON, J., delivered the opinion of the court. The proceedings in the court below were under the 11th section of the act regulating highways, to recover the penalty there given for neglecting to work on the highway, pursuant to notice. It has been decided by this court (3 *Caines*, 260.) that proceedings under this section of the act, are to be in a summary way; but the question here presented is, whether notice is required to be given to the party against whom the complaint is entered, before the magistrate issues his warrant to collect the fine. It is a just and reasonable rule that no person should be punished without having had an opportunity of being heard in his defence. Had the magistrate any thing to try, or any discretion to exercise, with respect to issuing the warrant, I should think it indispensably requisite that the party should be summoned to appear. But I cannot discover, from the provisions in this section of the act, that the magistrate has any

[* 476]

NEW-YORK
Nov. 1808.WALDRON
v.
M'CARTY.WALDRON *against* M'CARTY.

THIS was an action of *covenant*. The declaration set forth a deed, by which the defendant, on the 1st *May*, 1799, conveyed to the plaintiff, in fee, a certain parcel of land, and therein covenanted for himself and his heirs, "the premises thereby bargained and conveyed, in the quiet and peaceable possession of the plaintiff, his heirs and assigns, for ever to warrant and defend." The plaintiff then averred, that at the time of executing the deed to him, the premises were subject to, and encumbered with a mortgage, executed on the 1st *May*, 1790, by the defendant, to one *Oothout*, for securing the payment of 4521 dollars and 92 *cents, and that afterwards, by virtue of a decree of the Court of Chancery, the premises were sold at auction, for the principal and interest due on the mortgage; and that the plaintiff was obliged to purchase the premises, in order to prevent his being deprived and ousted of the same; and so, &c.

To this declaration there was a general demurrer and joinder.

Henry, in support of the demurrer. In an action of covenant, the plaintiff must set forth an eviction under a lawful title. (2 *Johns. Rep.* 1. 2 *Saund.* 177. n. 8. 10. 3 *Term Rep.* 587.) Should it be said that the decree of the Court of Chancery and sale are equivalent to an ouster, then it ought to have been shown that the plaintiff was a party to that suit, and bound by the decree. Further, the declaration does not state that the plaintiff paid any money, nor how much.

Van Vechten, contra. The covenant, for the breach of which this action is brought, is substantially a covenant for quiet enjoyment. Covenant will lie on a *warranty* in case of a *fine*; (1 *Lev.* 301. 2 *Saund.* 180.) and it was decided in *Staats v. Ten Eyck*, (3 *Caines*, 111. 1 *Term*, 671.) that covenant would lie on a warranty for quiet enjoyment. The suit in chancery was a disturbance sufficient to support this action; (5 *Viner*, 161, 162. *in notes.* *T. Raym.* 370, 371.) and the decree and sale amount to an actual ouster by a lawful title. There is sufficient certainty in the assignment of the breach in the declaration. It was not necessary to state how much money the plaintiff had paid for the land. The breach or injury complained of is the disturbance by the mortgage, the decree in chancery, and sale. It is enough to state a superior

M. gave a deed of land to W., and covenanted that he would warrant and defend W. in the quiet and peaceable possession of the premises. At the time of the conveyance, there was a previous mortgage on the land, and a suit

[* 472]
in chancery was afterwards brought by the mortgagee, and a sale of the premises decreed, and W. purchased the same at the master's sale, and then brought his action against M. for a breach of the covenant of warranty for peaceable enjoyment; and it was held, that an action could not be maintained on the covenant until there had been an eviction or actual ouster, by a paramount lawful title. (a)

(a) See *Kerr v. Shaw*, 13 *Johns.* 236. *Trustees of Newburgh v. Galatian*, 4 *Cow. Rep.* 343.

NEW-YORK,
Nov. 1808.
WALDRON
v
M'CARTY.

title which has been enforced to the disturbance of the plaintiff (4 *Term Rep.* 650, 651. 2 *Lev.* 37. 3 *Lev.* 305. 325. 2 *Saund.* 181. b. 1 *Term Rep.* 672. 2 *Shower*, 425.) It was not requisite for the plaintiff to show that he was a party to the suit; he does not undertake to set forth the decree, and all that can be required is, that the breach be laid with reasonable certainty. It was sufficient to state the suit in chancery, and the decree; for it is a necessary inference that all proper parties were before the court.

[* 473] *Henry*, in reply. The warranty is of the peaceable possession and the plaintiff should show an eviction by the *judgment of a court of law, or a paramount lawful title, by which the plaintiff has been turned out of possession. Suppose there had been a prior judgment against the defendant; and the premises had been sold under that judgment, that would not support this action, for the possession of the party would be still undisturbed. It does not follow, that because there was a decree of the Court of Chancery, that a writ of a *habere facias possess.* must have issued. The plaintiff ought to show that he was a party to the suit, and that he used all proper means to protect his possession; and it may be, if he had been a party, that he would have been relieved against the mortgage. It was requisite also, to set forth the sum paid by the plaintiff, in order to obtain a just measure of damages; and the defendant might have thought proper to pay it without a suit.

SPENCER, J., delivered the opinion of the court. The question submitted to our consideration is, whether, under the circumstances of this case, there is an eviction within the terms or spirit of the covenant. After a full examination of the cases relative to this point, and especially those cited on the argument, we do not find one, where an action of covenant has been brought on a covenant for quiet enjoyment, in which it is not expressly alleged, that there was an entry and expulsion from the possession, or some actual disturbance in the possession. The allegation of an entry and expulsion are so much of the essence of the action, that there are several cases in which issue is taken on that fact, notwithstanding, in those very cases, a lawful title, superior to the one conveyed by the deed containing the covenant for quiet enjoyment, is alleged. (1 *Lev.* 301. 2 *Saund.* 181. b. n. 10.) In good sense, the covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title. In the present case judging from the deed, it was never the intention of the grantor to covenant, that the lands were free from encumbrance. From precedents, and as no authority has been shown, that the covenant for quiet enjoyment is broken by any other *acts than

[* 474]

asked this question. I do not consider it in that light. That case arose upon a promissory note, and is upon a deed. The rules of evidence may be more safely relaxed in the one case than in the other. The parties may go into an inquiry as to the consideration of a note, or other simple contract; but a deed concludes them from such an inquiry. A deed is an act of much higher force and solemnity in the law. It carries with it internal evidence of a good consideration. A bond is not barred by the statute of limitations; it has priority in the payment of debts by executors or administrators; and, indeed, the whole real property of the country rests upon the evidence of title by deed. Some observations which were made when the opinion of the court was delivered in the case referred to, "apply to deeds as well as to simple contracts; but these observations must be considered as made by way of illustration, and not as immediately applicable to the case before the court, and do not, therefore, preclude a further discussion of this question. I concurred in that decision from a sense of the great inconvenience of the *English* rule, when applied to commercial paper, which circulates with equal facility and credit without the encumbrance of a subscribing witness, and because I did not recollect a case in which the application of the rule requiring the subscribing witness, did not arise upon a specialty. We are not, therefore, at liberty to extend that decision to deeds, and, consequently, to all the assurances of real property. Here we are certainly concluded by an ancient and uniform rule, that when the defendant has not acknowledged his deed before a competent public officer, or has not expressly agreed to admit it in evidence upon the trial, but has put himself upon his plea of *non est factum*, the plaintiff must produce the subscribing witness, and give the defendant the benefit of an investigation of the circumstances attending the execution of the deed. It may be of use, for a moment, to examine some of the authorities on this subject.

In the early periods of the *English* law, the names of the witnesses were always registered in the body of the deed. They were selected from the best men in the neighborhood; and if the deed was denied, they formed a necessary part of the jury, who was to try its validity. This rule continued, until the statute 12 *Edw.* II. c. 2. allowed the inquest to be taken without any of the witnesses being associated with the jury; but they were still to be summoned as usual. "It is agreed," says the statute, "that when a deed, release, acquittance, or other writing, is denied in the king's court, wherein the witnesses be named, process shall be awarded to cause such witnesses to appear, as before hath been used." The practice of joining the witnesses to the jury, continued through-

NEW-YORK,
Nov. 1803.

FOX
v.
REIL

[* 479]

NEW-YORK, the person complaining, and not be prosecuted in a summary way.
Nov. 1808.

BOUTON
v.
NEILSON.

Van Vechten, contra. This is a case of summary conviction. Nothing more was necessary than to pursue the directions of the act, in which nothing is said of notice to the party. This was a proceeding for a penalty under the 11th section of the act, which the court, in *Bennet v. Ward*, (3 *Caines*, 260.) admitted to be a case of summary conviction. The justice is required, on a complaint in writing from the overseer, *forthwith* to issue his warrant to a constable, directing him to levy the fine on the goods and chattels of the delinquent, and *forthwith* to pay the same to the justice, who is required to pay the same to the overseer. The office of the justice is merely ministerial; the overseer alone is the judge, and is bound under a penalty to make the complaint to the justice. This is not a proceeding under the act for the recovery of debts to the value of 25 dollars; and a *certiorari* is perfectly nugatory, for the fine levied is to be immediately laid out on the highway, and the overseer cannot be responsible after the money is expended; nor can it be recovered of the justice, who is required by the act to issue his warrant and collect and pay over the money.

[KENT, Ch. J. This court has a general superintending power over all inferior courts, and may review and correct all their proceedings, whether on a summary conviction or otherwise.]

Skinner, in reply, observed, that if a *certiorari* was not a proper remedy in this case, a party aggrieved by these summary proceedings would be entirely remediless.

[* 476] THOMPSON, J., delivered the opinion of the court. The proceedings in the court below were under the 11th section of the act regulating highways, to recover the penalty therein given for neglecting to work on the highway, pursuant to notice. It has been decided by this court (3 *Caines*, 260.) that proceedings under this section of the *act, are to be in a summary way; but the question here presented is, whether notice is required to be given to the party against whom the complaint is entered, before the magistrate issues his warrant to collect the fine. It is a just and reasonable rule that no person should be punished without having had an opportunity of being heard in his defence. Had the magistrate any thing to try, or any discretion to exercise, with respect to issuing the warrant, I should think it indispensably requisite that the party should be summoned to appear. But I cannot discover, from the provisions in this section of the act, that the magistrate has any

judicial powers whatever vested in him. If so, notice to the party would be superfluous. The overseer of the highways is made the judge with respect to the imposition of the fine. He acts under the oath of his office, and it is expressly made his duty in every case, in which *he* shall deem the excuse for neglect or refusal to work insufficient, to make complaint thereof in writing to a magistrate, and the magistrate is directed *forthwith* to issue his warrant to collect the fine. No authority is given to the magistrate to enter into an examination, with respect to the sufficiency of the excuse for neglecting to work. The overseer is made the *sole judge* of this. If he makes complaint to the magistrate, without having duly notified the party to work, he would subject himself to the penalty given in the 14th section of the act. Whether this power has been discreetly vested in the overseers of highways, is not for the court to say. In most cases of summary convictions, some judicial powers are given to the magistrates, and a summons or notice to the party complained of, is requisite; but where the magistrate acts *merely ministerially*, and has no discretion on the subject, no notice is required, because it would be useless. (7 Term Rep. 270. 3 Wils. 133.) The case before us falls under the latter distinction. The issuing of the warrant is matter of course, upon the complaint of the overseer, without any further investigation. The conviction must, accordingly, be affirmed.

NEW-YORK
Nov. 1808.

FOX
v.
REIL.

Conviction affirmed.

*FOX and PAYNE *against* REIL and REIL.

[* 477]

THIS was an action of *debt*, on a bond, to which there was a plea of *non est factum*. At the trial of the cause, at the *Herkimer* circuit, in *June*, 1808, before the *chief justice*, the plaintiff offered to prove that the bond had been shown to the defendants, a short time before the commencement of the present suit, and that they then confessed that they had duly executed the bond; but this evidence was objected to, and overruled by the chief justice. The plaintiffs, not being prepared to prove the bond, by the subscribing witnesses, or to account for their not being produced, were nonsuited.

Where there is a subscribing witness to a bond, proof of the confession of the obligor is not sufficient; but the witness must be produced, or in case he is dead or out of the state, his handwriting must be proved.

N. Williams, for the plaintiff, moved to set aside the nonsuit. He contended, that according to the decision of this

NEW-YORK,
Nov. 1808.

FOX
v.
REIL.

court in *Hall v. Phelps*, (2 *Johns. Rep.* 451.) proof of the confession of the obligor was sufficient, without producing the subscribing witness. It is true, that case was on a promissory note; but the principle of that decision must be applicable to every instrument, sealed or unsealed, to which there are subscribing witnesses.

In *Abbot v. Plumbe*, (*Doug.* 216.) where it was proved that the obligor had acknowledged that he owed the debt, and it was objected that the subscribing witnesses ought to have been called, Lord *Mansfield* considered the objection as capitious; and that it was a mere technical rule, which required the subscribing witness to be produced. The strictness of the ancient rule, in this respect, has in several instances been relaxed in the *English* courts. Where an instrument is executed abroad, or the subscribing witness resides in a foreign country, proof of his hand-writing is sufficient. (*Doug.* 93. 7 *Term Rep.* 265. and note. 1 *Bos. & Pull.* 360. See also 4 *East*, 53. 2 *Bos. & Pull.* 35. *Peake*, *N. P.* 30. 5 *Term*, 366.) A confession of the party is higher evidence than the testimony of a witness, who may know nothing, except that he signed his name to the instrument. If the subscribing witness should deny that he saw the deed executed, it may be proved by other witnesses. (*Peake*, *N. P.* 146. *Doug.* 216. 1 *Black. Rep.* 365.) The rule *laid down by this court in *Hall v. Phelps*, is not only a convenient, but a safe rule, for the evidence of the confession of the party must be full, clear and satisfactory.

[*478]

Gold, contra. The case of *Hall v. Phelps* was thought to be an innovation on the *English* rule of evidence. That was a suit on a promissory note; and in relation to unsealed writings, less strictness may, perhaps, be requisite. But the court will, no doubt, be cautious as to extending the rule to deeds. The relaxations of the ancient rule in *England* have not gone further, than to allow the proof of the hand-writing of the witness, where it is shown that he was absent in a foreign country, and beyond the reach of the party. Evidence of confessions is liable to abuse, and any greater relaxation of a salutary and established rule may produce more injurious consequences, than can well be foreseen.

KENT, Ch. J., delivered the opinion of the court. The question in this case is, whether proof of the acknowledgment by the defendants, out of court, and before some private person, that they had executed the bond, is good proof of its execution, upon the issue of *non est factum*, without producing the subscribing witness, or in any manner accounting for his absence.

The case of *Hall v. Phelps* has been thought to have de
366

asked this question. I do not consider it in that light. That case arose upon a promissory note, and this is upon a deed. The rules of evidence may be more safely relaxed in the one case than in the other. The parties may go into an inquiry as to the consideration of a note, or other simple contract; but a deed concludes them from such an inquiry. A deed is an act of much higher force and solemnity in the law. It carries with it internal evidence of a good consideration. A bond is not barred by the statute of limitations; it has priority in the payment of debts by executors or administrators; and, indeed, the whole real property of the country rests upon the evidence of title by deed. Some observations which were made when the opinion of the court was delivered in the case referred to, "apply to deeds as well as to simple contracts; but these observations must be considered as made by way of illustration, and not as immediately applicable to the case before the court, and do not, therefore, preclude a further discussion of this question. I concurred in that decision from a sense of the great inconvenience of the *English* rule, when applied to commercial paper, which circulates with equal facility and credit without the encumbrance of a subscribing witness, and because I did not recollect a case in which the application of the rule requiring the subscribing witness, did not arise upon a specialty. We are not, therefore, at liberty to extend that decision to deeds, and, consequently, to all the assurances of real property. Here we are certainly concluded by an ancient and uniform rule, that when the defendant has not acknowledged his deed before a competent public officer, or has not expressly agreed to admit it in evidence upon the trial, but has put himself upon his plea of *non est factum*, the plaintiff must produce the subscribing witness, and give the defendant the benefit of an investigation of the circumstances attending the execution of the deed. It may be of use, for a moment, to examine some of the authorities on this subject.

In the early periods of the *English* law, the names of the witnesses were always registered in the body of the deed. They were selected from the best men in the neighborhood; and if the deed was denied, they formed a necessary part of the jury, who was to try its validity. This rule continued, until the statute 12 *Edw.* II. c. 2. allowed the inquest to be taken without any of the witnesses being associated with the jury; but they were still to be summoned as usual. "It is agreed," says the statute, "that when a deed, release, acquittance, or other writing, is denied in the king's court, wherein the witnesses be named, process shall be awarded to cause such witnesses to appear, as before hath been used." The practice of joining the witnesses to the jury, continued through-

NEW-YORK,
Nov. 1808.

Fox
v.
REIL

[* 479]

NEW-YORK
Nov. 1808.

FOX
V.
BEIL.

out *the reign of *Edw. III.* and *Fortescue (de Laud. Leg. Ang. c. 32.)* mentions it as existing in the reign of *Hen. VI.* It gradually fell into disuse, and ceased about the time of *Hen. VIII.*, and until that period, the process to bring in the witnesses, upon the denial of a deed, continued, of which numerous instances are collected from the *Year Books*, by *Brooke. (Tit. Testmoignes.)*

When, therefore, the ancient law required the witnesses to a deed to form part of the jury, and continued down to the time of *Hen. VIII.* to compel them to come in, by similar process as that awarded for the jury, (see *Reg. Brev. jud. 60.* and *Thesaurus Brevium, 88.*) it cannot be supposed that the notion of proving a deed, by the confession of the party, *in pais*, was ever thought of or admitted.

Under *Hen. VI.* it was held, that if a deed be acknowledged and enrolled of record, the party was estopped to plead *non est factum*; but the case assigns a very sufficient reason for this, because, as was observed, upon every deed enrolled, the party shall be examined, and the deed shall be read to him by the court, and it is not to be supposed that the party has been deceived. (*Year Book, Hil. 9 Hen. VI. pl. 8.*)

In the case of *Smartle v. Williams*, (1 *Salk. 280.*) the Court of K. B., after debate, went, perhaps, a little further, and held that the acknowledgment of a deed by the party in a court of record, or before a master in chancery in the country, was good evidence of the execution of a deed, and such an acknowledgment estopped the party from relying on the plea of *non est factum*. In the subsequent case of *Dillon v. Crawley*, (12 *Mod. 500.*) the Court of K. B. determined that an endorsement upon a bond made by the obligor, under *his hand and seal*, three years after the date of the bond, and in which endorsement he recited part of the bond, and expressly owned it to be his deed, was evidence of the execution of the deed. But upon the argument of this case, the counsel for the defendant referred to a decision, where, upon *non est factum* *pleaded to a bond, one of the witnesses did not appear, and it was offered to be proven that he owned it his bond, but this was denied.

[* 481]

I have not met with any case, where the absence of the subscribing witness was not accounted for, in which the courts have allowed in evidence any species of confession by the party, which was inferior in its nature and less solemn in its form than that in the instance to which I have alluded, and I take it for granted that there is no such case. To admit the proof in the case before us, would be an innovation upon an established rule, and one which is not urged upon us by any strong considerations of public policy.

We are, accordingly, of opinion, that the motion on the part of the plaintiff must be denied.

Rule refused.

NEW-YORK,
Nov. 1808.

BARON
v.
ABEEL.

BARON against ABEEL.

THIS was an action of *trespass* for the *mesne profits*. The cause was tried at the *Washington* circuit, before Mr. Justice *Thompson*, in *June*, 1808. On the trial, the plaintiff produced the record of a judgment obtained against the casual ejector, in an action of ejectment, by default. The service of the declaration on the defendant, and the value of the land during the time he had been in possession, and the costs in the action of ejectment, were proved. The defendant then offered to prove, that before the commencement of the suit in ejectment, he had surrendered the premises to the plaintiff, who accepted the same, and that at the time the declaration in ejectment was served, he was not in possession of the premises, nor had been in possession since he surrendered them to the plaintiff. This evidence was offered not only to defeat the plaintiff's right to recover the *mesne profits*, but also any claim for damages on account of costs in the action of ejectment; but this evidence was objected to, and overruled by the *judge, who directed the jury to find a verdict for the plaintiff, and to allow the costs in the original action of ejectment. The jury found a verdict accordingly.

After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the *mesne profits*, against the tenant, and may also recover the costs of the action of ejectment; and the defendant is not allowed to offer any thing in evidence against the demand of the plaintiff, which might have been set up in the original action.

[* 482]

A motion was made to set aside the verdict, and for a new trial.

1. Because the evidence offered by the defendant was improperly rejected.

2. On account of the misdirection of the judge.

Foot, for the defendant, contended, that the defendant might give any thing in evidence, which did not controvert the plaintiff's title. Though he is precluded from disputing the plaintiff's title, he may offer any thing in evidence in mitigation of damages, or to show that the plaintiff is not entitled to consequential damages. Here the possession had been delivered up to the plaintiff, and he had no right to bring the action. In the *English* precedents of declarations for *mesne profits*, (2 *Burr.* 665.) the amount of the costs in the original action is stated. The defendant, having omitted to state them here,

NEW-YORK, ought not to have been allowed to recover them as part of the damages.
Nov. 1908.

BARON
V.
ABEEL.

Weston, contra, insisted, that, in an action of trespass for the *mesne profits*, the record of the recovery in the original action of ejectment was conclusive evidence. The one action is consequential to a recovery in the other, and the plaintiff must be therefore, entitled to his costs, as well as the *mesne profits*. (*Johns. Rep.* 366. 3 *Wilson*, 118. 2 *Burr.* 669.) Every thing is to be intended in favor of the plaintiff, and against the defendant in this action.

VAN NESS, J., delivered the opinion of the court. (SPEAKER, J., *hesitante*.) The service of a declaration in ejectment on the tenant in possession is considered as much the commencement of the suit, as the service of a *capias ad respondendum* in personal actions. The lessor of the plaintiff and the tenant are the real and substantial parties. (*Aslin v. Parkin*, 2 *Burr.* 665. *Van Alen v. Rogers*, 1 *Johns. Cases*, 238. *Goodtitle v. Tombs*, 3 *Wils.* 118.) Upon filing an affidavit of the service of the declaration, and entering the common rule, the tenant, if he means to *make a defence, is bound to appear, and if he omits to do so, judgment by default, in effect rendered against him, because he may be turned out of possession, and because he is liable for the costs in an action for the *mesne profits*. The effect of a judgment in ejectment, whether by default, or otherwise, upon the rights of the parties, is substantially the same as in personal actions. The form of the proceedings is different, but after judgment, the legal consequences are essentially the same. One of these consequences is, that the lessor has a right to bring an action for the *mesne profits*, for the double purpose of obtaining compensation for the use of the land, and recovering the costs of the ejectment. In the action for *mesne profits*, the defendant is precluded from setting up any defence of which he might have availed himself in the original action of ejectment. It has been said that there is a difference in this respect, between a judgment by default, and a judgment after verdict; but it has been settled otherwise. In the case of *Aslin v. Parkin*, Lord Mansfield, in delivering the opinion of the court, says, "There is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined; in the last case, it is confessed."

Again, in *Goodtitle v. Tombs*, where the question was, whether one tenant in common could maintain this action against the other, after a recovery in ejectment by default. *Wilmot*, Ch. J., said, "I consider the recovery in ejectment by default, or after verdict, as the same thing;" and *Gould*, J.,

says, "The action for the *mesne profits* follows the ejectment as a necessary consequence; and in this case, the judgment by default is of the very same effect as if it had been after verdict. The court will intend every thing possible against the defendant." These cases, especially the latter, are directly in point.

The defence relied upon in this suit would have been a good bar to the recovery in the action of ejectment; and to permit the defendant to set it up here, *would be to try the plaintiff's right to recover in the ejectment. By suffering a judgment to go by default, the defendant has admitted himself to be in possession; and it is now too late for him to controvert that fact. There is no greater hardship in this case than in every other, where the defendant suffers a judgment to be entered against him by neglecting to appear and defend the suit. The evidence offered was, therefore, properly excluded by the judge, and as the plaintiff claimed only nominal damages for the *mesne profits*, he was entitled to recover that, and the costs in the action of ejectment.

A question was made, on the argument, as to the plaintiff's right to recover the costs under the declaration in this cause; but as the pleadings are not set forth in the case, we are unable to give any opinion respecting it. The defendant must take nothing by his motion.

Judgment for the plaintiff.

NEW-YORK,
Nov. 1808.

JACKSON
V.
ALEXANDER

[* 484]

JACKSON, *ex dem.* HUDSON and CHAPMAN, *against* ALEXANDER and others.

THIS was an action of *ejectment*, for lot No. 68, in the town of *Milton*, in the county of *Cayuga*. The cause was tried before Mr. Justice *Spencer*, at the *Cayuga* circuit, on the 1st *July*, 1808. On the trial, the plaintiff gave in evidence an exemplification of a patent, (a) dated the 8th *July*, 1790, grant-

The words "for value received," in a deed, import a sufficient consideration, to raise a use to the bargainor, under the statute of uses: and the words, "make over and grant," in a deed, are sufficiently operative to convey lands, by way of a use. (b)

(a) By the act of the 6th *April*, 1790, letters patent are directed to be issued in the names of those who served in the army of the *United States*, and are made to relate back and vest the lands in the grantees, their heirs and assigns, from the 29th *March*, 1783; and all intermediate grants and dispositions made by the soldiers are declared to be as valid and effectual, as if the letters patent had issued on the 29th *March*, 1783. (*Greenleaf's* edition *Laws of N. Y.* v. 1. p. 353.)

(b) *Jackson v. Root*, 18 *Johns.* 60. *Jackson v. Florence*, 16 *Johns.* 47. See *Jackson v. M'Kenney*, 3 *Wend. Rep.* 233. *Jackson v. Pike*, 9 *Cow. Rep.* 69.

NEW-YORK,
Nov. 1808.

JACKSON
v.
ALEXANDER.
[* 485]

ing the lot in question to *Joseph Brown*, for his military service, and a writing executed by *Brown*, in the following words:—

*“ For value received of *Daniel Hudson & Co.*, I hereby make over and grant for myself, my heirs, and executors, unto the said *Daniel Hudson & Co.*, his heirs and assigns, my right and claim on the public for 600 acres of land. Witness my hand and seal, this 7th day of *May*, 1784.

Joseph Brown. (L. S.)

In presence of
Solomon Coures.
John Dolson.”

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts; and it was agreed, that if the court should be of opinion, that the instrument in writing from *Brown* to *Hudson*, one of the lessors of the plaintiff, was a sufficient conveyance of the premises in question, then judgment was to be entered for the plaintiff; otherwise, the verdict was to be set aside, and a nonsuit entered.

The cause was submitted to the court without argument.

SPENCER, J. There was no proof of a payment, or security given for the payment, of any consideration by *Hudson* to *Brown*; and the question is, whether the instrument stated in the case conveyed the land to *Hudson*. In my opinion it did not. This instrument cannot have any operation, unless as a bargain and sale, under the statute of uses. In *Mildmay's case*, (1 *Coke*, 176.) this point was decided, and it was held, “that a use cannot be raised by any covenant or proviso, or by any bargain and sale, upon a general consideration; and, therefore, if a man, by deed indented and enrolled, according to the statute, for, *divers good considerations*, bargains and sells his lands to another, and his heirs, *nihil operatur inde*, for no use shall be raised on such good consideration, for it doth not appear to the court that the bargainor hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient, or not; and that cannot be when it is alleged in such generality.” This decision has not been overruled; (*Vide* 1 *Leo*. 170. 2 *Roll Abr.* 786.) but on the contrary, it is cited *with approbation by Mr. *Sanders*, (340. a.) in his treatise on uses and trusts. In *Mildmay's case*, as also in *Sanders*, it is admitted that a consideration may be averred and proved; and if so, then that it will be sufficient to raise the use in the bargainee. *Blackstone*, (2 *Bl. Comm.* 296.) in his commentaries, lays down the law to be, “that a deed or other grant, made without any consideration, is, as it were, of no effect, for it is construed to enure, or to be effectual

[* 486]

372

only, to the use of the grantor himself." The learned Mr. *Christian*, in his note upon the text of *Blackstone*, says, that he conceives this to be true only of a bargain and sale, and cites *Sheppard's Touchstone*, p. 221. to establish the difference between a bargain and sale, and a gift; and, according to him, "the latter may be without any consideration or cause at all, but the former hath always some meritorious cause moving it, and cannot be without it."

That the words, *for value received*, have a more extensive meaning, or import a consideration with more certainty, than the words, *for divers good considerations*, can scarcely be pretended. Indeed it has been settled in this court, in the case of *Lansing v. M'Killip*, (3 *Caines*, 287.) that the words *value received*, in a note, not within the statute, did not import such consideration as would support the promise, but that the consideration must be set forth. And *non constat*, but that something altogether without value, and against law, was the real consideration.

The position so frequently met with in the books, that every deed imports a consideration, is true only with respect to such deeds as are sought to be enforced as between the parties. Deeds conveying lands stand on different grounds, and have principles peculiar to themselves; and I cannot admit, that the instrument under consideration declares the use to *Hudson*, and that, therefore, a consideration is not necessary; for it is impossible to conceive a more bald and naked deed (if it deserves that appellation) in all its provisions.

It may, perhaps, be said, that the want of a precise consideration in the deed is mere matter of form, and that, *had this deed been pleaded without any averment as to the consideration, the omission could have been taken advantage of only by a special demurrer, and would have been good on a general demurrer. This brings the question back to the point, whether it is essential to the validity of a deed that it should either express a consideration, or that that one should be averred and proved. From the authorities already cited, it appears that a consideration is not matter of form, but of substance. Other cases may be added to the same effect. (1 *Lev.* 170. *Moore*, 569. 1 *Mod.* 262. 2 *Mod.* 249.) There is some diversity in the books, whether even a verdict would cure the omission of an averment of a consideration; the latter adjudications are that it will. (1 *Lord Raym.* 111. 2 *Str.* 1228. 1 *Wils.* 91.) If a verdict will cure such omission, it is on the well-established principle, that it being essential to the validity of the deed, that a consideration be proved, after verdict it will be intended: and the omission does not evince a defective title, but a title defectively set forth.

In the case of *Bolton v. The Bishop of Carlisle*, (2 *H. Black.*

NEW-YORK.
Nov. 1808.

JACKSON
V.
ALEXANDER

[* 487]

NEW-YORK,
Nov. 1808.
JACKSON
V.
ALEXANDER

261.) the court seemed to think, that such a defect was only to be taken advantage of on a special demurrer, on the principle that it was a matter of form. On this decision I have no other observation to make, but that it is since our revolution, and contrary to all the cases on the subject.

[* 488]

THOMPSON, J. This case has been submitted without argument, and the question presented for our decision is, whether the instrument in writing given by *Joseph Brown* to *Daniel Hudson*, be sufficient to convey the title to the premises in question. The want of any consideration either expressed on the face of the instrument, or proved at the trial, is the principal objection to its operation. All deeds by which land may be conveyed, derive their effect from the common law, or from the statute of uses. It cannot be pretended that this instrument can take effect as a common law conveyance, either original or derivative. (4 *Cruise, on Real Property*, 100.) If it is to have any operation, it must be as a bargain and sale, by virtue of the statute of uses. That statute has given rise to several new forms of conveyance, which operate contrary to the rules of the common law. It is a general rule of the common law, that it is not absolutely necessary, that a consideration should be expressed in a deed. The thought and deliberation, which was supposed to attend the making and executing of deeds, rendered them valid, without any consideration expressed. Soon, however, after the chancellors had assumed a jurisdiction in cases of uses, they adopted the maxim of the civil law, "*ex nudo pacto non oritur actio*," and in conformity to it, they determined not to lend their aid to carry any deed into execution, unless it was supported by some consideration. (4 *Cruise*, 24.) Hence it has become a universal rule, that a use cannot be raised without a consideration; and a bargain and sale, being merely a conveyance of a use, it cannot be effectual without a consideration, which must be valuable, for the very name of the conveyance imports a *quid pro quo*. (1 *Co.* 176. a. *Sanders, on Uses*, 340. 2 *Inst.* 671. 4 *Cruise*, 173—8.) That a consideration is requisite to raise a use, is a principle recognized by almost every elementary writer on the subject; and has been repeatedly sanctioned by adjudged cases. The expression of *Sir Wm. Blackstone*, (2 *Comm.* 296.) may be too broad when he says, that a deed or grant, made without any consideration, is of no effect, and is to be construed to enure, or be effectual only, to the use of the grantor: Yet Professor *Christian*, in his note on this passage, admits this position to be true with respect to a *bargain and sale*. Baron *Comyn*, also, says, that a bargain and sale of land, whereby a use arises, ought to be made upon a valuable consideration, otherwise no use arises; and the consideration must not be too general, but must import

a *quid pro quo*. (2 Com. Dig. 6. 3 Com. Dig. 275—7.) We find the same principle recognized by the late editor of *Bacon's Abridgment*, (1 Bac. Abr. 496. *Shep. Touch.* 220.) It is there said, that by a bargain and sale of land no use arises, unless there be a consideration of money; for selling, *ex vi termini*, supposes the transferring a right of something, for money, and if there be no such consideration, it may be an exchange, a covenant to stand seised, a grant, &c., but can be no sale within the statute. The judgment of the court, in *Mildmay's* case, (1 Coke, 176.) was governed by the same principles; and in *Doe, ex dem. Milburn, v. Salkeld*, (*Willes*, 675.) Lord Ch. J. *Willes*, in delivering the opinion of the court, upon the nature and operation of a deed, set forth in the case, observes, it cannot be considered as a bargain and sale, because there was *no money consideration*.

In the case of *Ward v. Lambert*, (*Cro. Eliz.* 394.) the deed recited, "that whereas I. S. was bound in a recognizance, and other bonds for him, he, for *divers good considerations*, bargained and sold the land to him and his heirs; and this was held not to be a good bargain and sale. The court said, that in every bargain and sale there ought to be a *quid pro quo*; but the vendor there had nothing for his land, and, therefore, it was void. If a man give land, or bargain and sell land to his son, no use arises thereby. If, then, a *valuable consideration* be necessary to raise a use, the next question will be, whether the instrument before us, upon the face of it, imports the consideration required in a bargain and sale, under the statute of uses. If it does, it must arise either from the internal force of the words "*for value received*," or by virtue of the seal. A *valuable* consideration is defined in the books, to mean money, or any other thing that bears a known value. (4 *Cruise*, 24.) This court, in the case of *Lansing v. M'Killip*, (3 *Caines*, 288.) considered the words, *for value received*, of little force and importance of themselves, towards making out a consideration. Independently of that decision, however, I cannot discover more efficacy in these words than in many others which have been used in instruments, that have been adjudged inoperative as bargains and sales. All the cases I have cited to show the necessity of a consideration, plainly indicate, that if it is to be inferred from the face of the deed, it ought to be *so* expressed as necessarily to import value. It must not, in the language of Baron *Comyn*, be too general. It seems to me, that as much may be inferred from the word *consideration* as the word *value*. And it has repeatedly been adjudged, that an acknowledgment of the receipt of a *consideration generally* was not sufficient. Although this may have the semblance of a technical nicety, incompatible with the broad principles of justice, yet the rule appears to me to be too firmly established to be

NEW-YORK,
Nov. 1808.

JACKSON
V.
ALEXANDER

[* 489]

[* 490]

CASES IN THE SUPREME COURT

overturned. Many of the common law principles, applicable to other contracts, cannot be applied to bargains and sales under the statute of uses.

In *Mildmay's* case, and also that of *Ward v. Lambert*, before referred to, the words, *divers good considerations*, were considered insufficient to raise a use, being but *general parlance*, implying nothing, unless express considerations were shown; for otherwise none would be intended. So in *Fisher v. Smith*, (5 *Vin. Abr.* 406. *note.*) the court were clear, that if one pleads a bargain and sale, in which no consideration of money is expressed, then he ought to supply it by an averment that it was for money; and that the words, *for divers good considerations*, shall not be intended for money, without an averment; but if the deed expresses, for a competent sum of money, it is sufficient, without showing the certainty of the sum; and none shall say that no money was paid; for against this express mention in the deed, no averment that no money was paid shall be admitted. An acknowledgment in the deed of the receipt of money, *ex vi termini*, imports value, and the amount of the consideration is immaterial. It has been repeatedly ruled that, if in pleading a bargain and sale, no valuable consideration is shown, it will be ill on demurrer. In many cases the verdict has been deemed to cure this defect, which must have been on the ground, that after verdict, the consideration is presumed to have been proved on the trial. (1 *Lord Raym.* 111. 1 *Wils.* 91. 2 *H. Black.* 261.) From all the cases referred to, it is evident that the court did not consider the seal, as virtually importing the requisite consideration; for the instruments, although under seal, were deemed inoperative, as bargains and sales. It would have been competent for the plaintiff, in the present case, to have proved a consideration paid, (5 *Vin.* 507.) which, in my opinion, would have made the deed effectual to transfer the title; the word *grant* being sufficient to pass the land by way of use. (2 *Mod.* 253.) Under this view of the case, I should be inclined to grant a new trial, to give the plaintiff an opportunity of producing this proof, if in his power, without the expense of a new action; but according to the stipulation in the case, a judgment of nonsuit, in my opinion, ought to be entered.

KENT, Ch. J. I am of opinion that the deed from *Brown* to *Hudson* was sufficient to convey his interest in the premises.

I agree that the deed, if it operates at all, must operate as a bargain and sale under the statute of uses.

At the common law, a feoffment or lease was valid, without any consideration, in consequence of the fealty or homage which was incident to every such conveyance. The law raised a consideration out of the tenure itself. But after the statute

of *Quia Emptores*, (18 Ed. I.) *Perkin.* says, that a consideration became requisite even to the validity of a feoffment, as none could be implied, since, according to the statute, no feudal duty or service resulted to the immediate feoffor. (*Perkins*, sect. 528—537.) The general, and the better opinion is, that the notion of a consideration first came from the court of equity, where it was held necessary to raise a use; and when conveyances to uses were introduced, the courts of law adopted the same idea, and held that a consideration was requisite in a deed of bargain and sale. This new principle in the doctrine of assurances by deed, met, at first, with a very strong resistance from the ablest lawyers of the age. *Plowden*, in his argument in the case of *Sharington v. Stroffen*, (1 *Plowden*, 308, 309.) which arose upon a deed under the statute of uses, contended, with great force of reason and authority, that a deed, which *was a solemn and deliberate act of the mind, did of itself import a consideration; that the will of the grantor was a sufficient consideration, and it never could be called a *nudum pactum*. Lord *Bacon*, in his reading on the statute of uses, takes notice of this argument of *Plowden*, and gives it the weight of his sanction. "I would have one case showed," said he, "by men learned in the law, where there is a deed, and yet there needs a consideration. As for *parole*, the law adjudgeth it too light to give an action without consideration; but a deed, even in law, imports a consideration, because of the deliberation and ceremony in the confection of it; and, therefore, in 8 *Reginæ*, it is solemnly argued that a deed should raise a use without any other consideration." (*Bacon's Works*, v. 4. p. 167.) But notwithstanding this strenuous opposition, the rule from chancery prevailed, and it has been long settled, that a consideration, expressed or proved, was necessary to give effect to a deed of bargain and sale. I am not going to attempt to surmount the series of cases on this subject, though I confess myself a convert to the argument of *Plowden*. I admit the rule that a consideration is necessary to a conveyance to uses; but I think that here is evidence of a consideration, appearing on the face of the deed before us, sufficient to conclude the grantor, and to give effect to it as a bargain and sale.

The rule requiring a consideration to raise a use, has become merely nominal, and a matter of form; for if a sum of money be mentioned, it is never an inquiry whether it was actually paid, and the smallest sum possible is sufficient: nay, it has been solemnly adjudged, that a pepper-corn was sufficient to raise a use. (2 *Vent.* 35.) Since, then, the efficacy of the rule is so completely gone, we ought, in support of deeds, to construe the cases which have modified the rule, with the utmost liberality.

The deed in the present case states, that "*for value received*"

NEW-YORK
Nov. 1808.

JACKSON
V.
ALEXANDER

[* 492]

NEW-YORK,
Nov. 1808.

JACKSON
V.
ALEXANDER.
[* 493]

of the grantee, he doth grant," &c., and can it now be permitted to the grantor to say there was no value received? *Value received* is equivalent to saying, money was received, or a chattel was received. It is an express averment, *ex vi terminis*, of a *quid pro quo*. In *Fisher v. Smith*, (*Moore*, 569.) there was a bargain and sale for *divers considerations*, and it was held not to be enough, without an averment, that it was for money. "But if the deed express for a *competent sum of money*, this is sufficient without mentioning the certainty of the sum, and against this express mention in the deed, no averment or evidence shall be admitted to say that no money was paid." All the cases that I have examined, which say that a general consideration is not sufficient, are cases in which the words in the deed were for *divers good considerations*. I have not met with any case which goes so far as to say, that an averment in the deed of *value received by the grantor*, was not sufficient. It is said, in 2 *Roll. Abr.* (786. pl. n.) that "an averment that a bargain and sale was in consideration of money or other valuable consideration given, was sufficient." If the words had been *for money received of the grantor*, then the deed would have fallen exactly within the decision in *Moore*, and would have been good, according to the admission in all the books. I cannot perceive any essential difference between the two averments; *value received* does, in judgment of law, imply money, or its equivalent. The grantor must be estopped by this express averment in his deed. He admits not only a value, but a value received from the grantee; and if we will not intend this value to be something valuable, or equal to a competent sum of money, we seem not to construe charters as they did in the case of *Fisher v. Smith*, and as the law axiom requires them to be examined, *benignly, and in support of the substance*. The statute of 9 and 10 *Wm. III.* c. 17. regards those words of so much import, that if a bill contains them, the holder is then entitled to recover interest and damages against the drawer and endorser; and in *Cramlington v. Evans*, (1 *Show.* 4. *Carth.* 5.) Lord Holt laid great stress on these words. "If the drawer," he says, "mention for *value received*, then he is chargeable at common law; but if no such mention is made, then you must come upon the custom of merchants only." I mention these authorities only to show that these words mean something; and that, in certain cases, at least, the law has attached the meaning of real actual value to the averment of value received, and that in those cases, it has been considered as equivalent to saying *for money received*.

The law from the beginning has been very indulgent in helping out deeds, on the ground of consideration. If no consideration be expressed, one may be averred in pleading, or proved upon the trial. (*Mildway's case*, 1 *Co.* 175. *Fisher v. Smith*, *Moore*, 378

569.) In pleading a bargain and sale, in which no consideration is expressed, it was held, (in *Smith v. Lane, Moore*, 504.) that the bargainee need not aver payment of money, because it was implied. This was afterwards held otherwise; but it has been lately held by the Court of C. B. (2 *H. Black*. 259.) that this averment was but matter of form, and the omission of it cured, on a general demurrer. This last decision seems to have almost done away even the form of the old rule, for it can hardly be necessary to prove upon trial, under the general issue, a fact which is matter of form, and not of substance. A plaintiff is bound to prove only what would be considered as material averments, and matters which go to the substance of the action.

NEW-YORK
Nov. 1808.

JACKSON
V.
ALEXANDER

But I place my opinion on the ground that the deed contains a sufficient averment of a consideration, to estop the grantor, and to give the deed operation, under the statute of uses. I am not apprized of any case which is an authority against this conclusion. In *Lansing v. M Killip*, (3 *Caines*, 286.) two of the judges intimated that *value received* did not supersede the necessity of averring and proving a consideration in a special agreement; but another of the judges went largely into the support of a contrary opinion. The case, however, was not decided upon that ground, but upon another, viz. that where the plaintiff alleges two good considerations in his declaration, he must prove them as laid.

*The next point in the case is, whether the words, "make over and grant," be sufficient to convey *Brown's* interest in the land. The word *grant* has been held sufficient to pass lands by way of use. (2 *Mod*. 253. *T. Raym*. 48.) Though in its original meaning, the word applied only to a conveyance of incorporeal hereditaments, which could not pass by livery of seisin, yet in conveyances under the statute of uses, it is sufficient, if the granting words are competent to raise a use; for the statute then performs the task of the ancient livery of seisin.

{ v 495

My opinion on both points, accordingly, is, that the plaintiff is entitled to judgment.

VAN NESS, J., and YATES, J., were of the same opinion.

Judgment for the plaintiff.

NEW-YORK,
Nov. 1808.

JACKSON
v.
SEAMAN.

JACKSON, *ex dem.* HORNBECK and others, *against*
SEAMAN.

The commissioners of the land-office had a right to grant certain lots of land reserved by the act of the 8th February, 1789, to make up certain deficiencies therein mentioned, where application for a compensation for such deficiency [* 496] • was not made on or before the 1st January, 1798, the lots so reserved and not appropriated to make up such deficiencies before that time, being held to be unappropriated lands, and to be disposed of as such, pursuant to the acts of the legislature. A person in possession of such a lot, against whom an action of ejectment was brought by a patentee, was held not entitled to any compensation for his improvements on the land.

THIS was an action of *ejectment*, for lot No. 64, in the town of *Aurelius*, in the county of *Cayuga*. The cause was tried before Mr. Justice *Spencer*, at the *Cayuga* circuit, the 2d July, 1808.

The plaintiff produced in evidence, letters patent, dated the 3d September, 1805, reciting that by letters patent from the people of the state of *New-York*, dated the 29th April, 1791, 1,000 acres of land were granted to *Benjamin Hornbeck* and four others, as tenants in common, which land had since been found to be included in land ceded by the state of *New-York* to the commonwealth of *Massachusetts*; and that by the report of the attorney general, *made the 6th October, 1802, each of the patentees was entitled to a patent for 200 acres, in severalty, in restitution of an undivided part of the said 1,000 acres of land before granted to them in common; and that *Benjamin Hornbeck* being deceased, they therefore granted unto the lessors, being the executors and legal representatives of *Benjamin Hornbeck*, deceased, 200 acres of land to be laid out in a square, as nearly as might be, in the north-west corner of lot No. 64, in the township of *Aurelius*, in the military tract, &c.

It was admitted that the town of *Aurelius*, in which the premises in question are situated, is a part of the military tract, and was erected into a town prior to the 6th of April, 1796, and that the premises in question are a part of one of the four lots reserved by the 6th section of the act of the legislature, entitled, "An act to appropriate the lands set apart for the use of the line of this state, lately serving in the army of the *United States*, and for other purposes therein mentioned," passed the 8th February, 1789, to satisfy the surplus shares of non-commissioned officers not corresponding with the division of 600 acres, and to compensate such persons as might by chance have drawn any lot or lots, the greater part of which might be covered with water.

On the part of the defendant it was contended, that by the act of the legislature, entitled, "An act supplementary to an act, entitled, An act authorizing the surveyor-general to ascertain the eastern boundary line of the lands ceded by this state to the commonwealth of *Massachusetts*, and for other purposes therein mentioned," passed the 6th April, 1796, the commissioners of the land-office had no right to issue the letters patent to the lessors of the plaintiff, for the premises in question

The defendant's counsel offered also to produce, and read in evidence, an act of the legislature, entitled, "An act for the sale of the unappropriated lands, and for other purposes," passed the 6th *April*, 1803; and to prove further that the defendant was in possession of the premises, prior to the 6th **April*, 1803, and had made improvements thereon, since that time, to more than the value of 25 dollars; but this evidence was objected to, and overruled by the judge.

The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case containing the above facts, with liberty for the defendant to enter a judgment of nonsuit, in case the court should be of opinion that the plaintiff was not entitled to recover.

Kellogg, for the plaintiff.

Richardson, for the defendant.

THOMPSON, J., delivered the opinion of the court. The lessors of the plaintiff claim title to the premises in question, under a patent to them, bearing date the 3d *September*, 1805, for 200 acres of land, in lot No. 64, in the town of *Aurelius*, in the military tract. It was admitted on the trial, that the premises were a part of one of the four lots reserved by the 6th section of the act of the legislature of this state, entitled, "An act to appropriate the lands set apart to the use of the troops of the line of this state, lately serving in the army of the *United States*, and for other purposes therein mentioned," passed the 8th *February*, 1789. (*Greenleaf's* ed. v. 1. p. 284.) These lots were reserved for the purpose of making up certain deficiencies designated in the act. The objection taken on the part of the defendant, to the operation of the patent, is, that the commissioners of the land-office were not authorized by law to appropriate this land, in the manner they have done by this grant. The objection does not appear to us to be well taken. By the act of the 24th of *March*, 1795, (*Greenleaf's* ed. v. 3. p. 200.) provision is made for restitution to persons to whom lands had been granted, which fell within the tract previously ceded by this state to the commonwealth of *Massachusetts*. The lessors of the plaintiff are persons of this description, and other lands, in lieu thereof, were to be granted to them out of any unappropriated lands within this state. It is said, however, that the land contained in this patent was appropriated to the objects mentioned in the act of *February*, 1789. By this *act, no time is limited within which the deficiencies should be ascertained. But by an act of the 11th *April*, 1799, (*Greenleaf's* ed. v. 3. p. 351.) no compensation for any deficiency was to be made, unless application for the same was made on or

NEW-YORK,
Nov. 1808.

JACKSON
V.
SEAMAN.

[* 497]

[* 498]

NEW-YORK,
Nov. 1803.
JACKSON
v
SCISSAM.

before the 1st *January*, 1798. All these reserved lots, not appropriated to make up such deficiencies, previous to that time, would, of course, become unappropriated lands. And by an act of the 11th *April*, 1804, (27th sess. ch. 3.) these reserved lots are expressly declared to be unappropriated lands.

Admitting the plaintiff's right to the land, the defendant claims compensation for the improvements, under the 8th section of the act of the 11th *April*, 1803. (26th sess. ch. 106.) If the commissioners of the land-office had a right to issue a patent to the lessors of the plaintiff, in the manner they have done, this is not a case coming within the act under which compensation for improvements is claimed. This provision applied only to cases where the sales were made under that act, and the improvements were to be ascertained and paid for, before the letters patent were to be issued. In the present case, the patent was not issued under the authority of the act of the 6th *April*, 1803, and, of course, none of the provisions relative to a compensation for improvements, are applicable.

The court are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff

[* 499] JACKSON, *ex dem.* VANDEUZEN and others, *against*
SCISSAM.

An acknowledgment by a person, under whom the defendant in ejectment claims to hold the land, that he went into possession under the lessors of the plaintiff, is conclusive against him as to the tenancy. (1)

THIS was an action of *ejectment*, for land in *Kinderhook*, in the county of *Columbia*. The cause was tried before the *chief justice*, at the *Columbia* circuit, the 17th *December*, 1806.

The plaintiff proved, that in the year 1778, *Johannes Huyck*, *Lucas Goes*, *John D. Goes*, *William Klaw* and *Burger Huyck*, being freeholders and inhabitants of the county of *Kinderhook*, took possession of a tract of land, containing about 400 acres, comprising the premises in question, by cutting a possession-fence, and lopping bushes round the tract: at which time no person was in possession of the premises, which are situated within the *Kinderhook* patent; that two years afterwards, the same persons renewed their possessions, and that they cut fire wood and fencing materials on the

(1) See *Jackson v. Harper*, 5 *Wend. Rep.* 246. and the cases there cited. *Jackson v. Davis*, 5 *Cow. Rep.* 129.

land, but none of them lived on the land, or cultivated any part of it; that the greatest part of the land was held and cultivated by persons in opposition to the claim or possession above stated.

NEW-YORK,
Nov. 1808.
JACKSON
V.
SCISSAM.

Several witnesses testified, that the proprietors above named had, at several times, particularly in 1786 and 1790, renewed the possession-fence, and had cut wood in various parts of the enclosed tract; and it appeared that at the time of the trial, the lessors of the plaintiff had various actual possessions on the tract, amounting to 171 acres.

The plaintiff then produced in evidence the last will and testament of *John D. Goes*, one of the proprietors, dated the 23d January, 1789, by which he empowered his executors, therein named, to sell his real estate; a deed from *John D. Goes* to *William Pulen*, one of the lessors of the plaintiff, dated the 4th May, 1792, for an undivided sixth part of the tract of land above-mentioned; a deed from *Johannes Huyck*, another of the proprietors, to *Jacob Vandeuzen*, another of the lessors of the plaintiff, for an *undivided sixth part of the same tract; the last will and testament of *Lucas Goes*, dated the 25th August, 1803, devising all his real estate to his executors therein named, two other lessors of the plaintiff; a deed from *Peter Van Beuren*, dated 7th September, 1804, to *William Pulen*, one of the lessors of the plaintiff, for an undivided sixth part of the said tract; a deed of surrender from *Samuel Van Huyck*, to the lessors of the plaintiff, of 16 acres of land, part of the said tract, dated 23d November, 1805.

[* 500]

It was admitted that *William Klaw* died in 1806; and his heirs are also lessors of the plaintiff.

The plaintiff also produced the *Kinderhook*, or general patent, as it is called, dated in 1686, and offered to prove, that no partition of the patent had ever been made, and that the freeholders and inhabitants of the town, universally, held their lands pursuant to possessions originally taken, in the same manner as the possession under which the lessors of the plaintiff claim; but this evidence was overruled by the judge.

It was proved that one *Samuel Smith* occupied the premises in question, and that the defendant came into possession under him; that while *Smith* was in possession, he said that he held under *Lucas Goes* and *Andries Klaw*, a son of *William Klaw*; that in 1790, or 1791, when *Smith* first entered on the premises, he was warned off, when *Smith* said, that he settled under *William Klaw*, one of the proprietors.

It was also proved, that both *Smith* and *William Klaw*, when *Smith* first settled on the premises, declared that *Smith* was to have the premises for six years, and to pay twelve pounds, and to be compensated for his improvements at the end of the

NEW-YORK,
Nov. 1803.

JACKSON
V.
SCISSAM.

[* 501]

term. Several witnesses also testified to similar declarations of *Smith*.

The defendant produced a deed from *Samuel Smith*, to him, dated the 29th *April*, 1759, for the consideration of 300*l.* with full covenants. *Smith*, having been released by the defendant, was admitted as a witness, and testified, that he never settled under *Klaw*, nor had any leave from *him, nor had ever said that he had settled under him; that he cleared the land himself, except a small part previously cleared by one *Peter H. Gardinier*; and that he had known the premises about 16 years; he also proved a deed from *Gardinier* to him, dated in *August*, 1750; that he built a shop on the premises, and had lived quietly thereon for 8 years, without any demand of rent being made. *Gardinier* also testified, that he once lived near the premises, and gave the deed to *Smith*; that *William Klaw* was his next neighbor, and never complained of the sale, and knew that he had cleared a part of the premises before he sold them to *Smith*.

Another witness testified that, six years ago, *William Klaw* told him that *Smith* erred in selling the land, for it belonged to *Peter H. Gardinier*.

The chief justice charged the jury, that the *Kinderhook* patent had no relation to the cause: that it gave no right to the lessors of the plaintiff to take possession, nor did they derive any right from the possession-fence, as it was called, or the renewal of it; that the proof of the tenancy of *Smith* was not sufficient, admitting even that he made the declaration stated by the witnesses; that there must be either a lease, or a payment of rent, to constitute a tenancy. The jury, under the direction of the judge, found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial, on the ground of the misdirection of the judge.

Van Beuren and *E. Williams*, for the plaintiff. 1. Evidence of possession must be according to the subject matter. Evidence of the possession of a house will be stronger and more decisive, than that of a piece of woodland. The enclosing of land, followed by repeated acts of ownership, ought, according to the circumstances of the case, to be sufficient evidence of a possessory title. If the acts of possession are such as to afford public and notorious evidence of ownership, it is all that can reasonably be required.

[* 502]

*The case of *Jackson*, ex dem. *Hardenbergh* and others, v. *Schoonmaker* (2 *Johns. Rep.* 230.) may, perhaps, be cited to the contrary; but that case was different from the present. There, the defendant offered to establish an adverse possession, taken with a view to defeat a title; and the court, in favor of right, very properly required the highest evidence of possession

Here was evidence of a previous possession, and, under the *Kinderhook* patent, such possession would be lawful. It was not necessary to show a possession for 20 years. (2 *Johns. Rep.* 22. 3 *Burr.* 1563.)

NEW-YORK
Nov. 1808
JACKSON
V.
SCISSAW

The question, in this case, as to what will be sufficient evidence of a possession to enable the plaintiff to recover, is important to the whole town of *Kinderhook*, which has been possessed under the general patent. The evidence produced showed, that the manner in which the lessors of the plaintiff took possession, had been invariably practised by the inhabitants, and it is fairly to be presumed, that this mode of designating the property of the different possessors, was sanctioned by the town meeting. The fence which enclosed the tract was, emphatically, a *possession-fence*; it is not evidence of a mere right of possession, but of an actual possession; and when accompanied by the repeated acts of cutting wood, affords the only evidence of the possession of woodland, of which the subject matter is susceptible. But it also appears that the lessors of the plaintiff actually cultivated 170 acres of the tract. All these acts established a reputation that the proprietors were the real possessors of the land; and ought to prevail against a mere intruder, without any title.

2. The defendant claims under *Smith*, and must, therefore, be bound by his acts and declarations. Six witnesses testified, that *Smith* confessed that he had entered under one of the lessors of the plaintiff. Having admitted his tenancy, he is estopped from setting up any adverse or outstanding title in another. (1 *Caines*, 144. See *Jackson*, ex dem. *Dobbin*, ante, p. 223.) The evidence of this acknowledgment of title was conclusive against the defendant.

Van Vechten and *Foot*, contra. When a plaintiff in ejectment sets up a possessory title, he must show it to be *such a title as the law will recognize. Title implies right, and a person who claims by a possessory title, must show a right of possession. A defendant in ejectment, who claims to hold by such a title, must prove an adverse possession of 20 years, to bar the plaintiff's right of entry; such a possession being evidence of a legal title or fee. (*Cowp.* 597. *Runnington*, 14. 17.)

[* 503]

If proof of 20 years' adverse possession is necessary to protect the defendant in his possession, then, *e converso*, such a possession is requisite to enable a plaintiff to recover on a possessory title; for it would be absurd to allow a plaintiff to recover possession, on less evidence than would be sufficient to enable a defendant to retain it. Possession affords only a legal presumption of right, and the law has fixed a period, when it shall be considered as a *fee* or *title*. There is a naked

NEW-YORK,
Nov. 1908.

JACKSON
v.
SCISSAM

possession, *sine aliquo vestimento*, as *Bracton* expresses it, unaccompanied with any title or claim of title. By such a possession, no right is acquired, on which the party can maintain an action of ejectment. (2 *Term Rep.* 749. 1 *East*, 246.) The felling or lopping of trees was an arbitrary act, not done with reference to any right or title. Had the lessors of the plaintiff marked the trees round the land, it would have been equal evidence of a possession. Cutting wood is an equivocal act, and may be done by a trespasser, as well as by the owner. The case of *Jackson*, ex dem. *Hardenbergh*, v. *Schoonmaker*, (2 *Johns. Rep.* 230.) is strong and decisive on this point.

2. A mere permission to another to go on the land, without any agreement as to rent, will not amount to a tenancy. To constitute the relation of landlord and tenant, there must be a contract or agreement, as to the terms on which the land is to be held. It is true, one witness has said, that *Klaw* was to have twelve pounds a year, and pay for the improvements; but there was no evidence that any rent was ever demanded or paid. Had there been any such agreement to pay rent, there would, no doubt, have been some proof of a demand of rent, during near fifteen years.

[* 504]

*3. The evidence as to the *Kinderhook* patent was properly rejected, as it merely concerned the rights and acts of third persons, and could not establish any right of the lessors of the plaintiff against the defendant.

THOMPSON, J., delivered the opinion of the court. The confessions and acknowledgments of *Samuel Smith*, from whom the defendant derives his title, appear to be conclusive in this case, according to the principles repeatedly recognized in this court. From the testimony of one witness, it appears that *Smith*, while he was in possession of the premises, told him that he settled there under *Lucas Goes* and *Andries Klaw*, son of *William Klaw*. Another witness testified, that thirteen or fourteen years ago, when *Smith* first settled there, he was warned off by *Peter M. Van Beuren*, one of the proprietors, upon which *Smith* told him, that he settled there under *William Klaw*, another of the proprietors. To another witness he acknowledged, that he settled on the premises under *William Klaw*; that he was to have the same for six years, for twelve pounds; and that *Klaw* was to pay him for the improvements at the end of the term. Similar declarations were made to a number of other witnesses. Here appears, then, to be a full and ample recognition of the title under which the lessors of the plaintiff claim.

In the case of *Jackson*, ex dem. *Low*, v. *Reynolds*, (3 *Caines*, 444.) the proof was, that the defendant had confessed that he had entered without title, and that he had agreed to purchase

from the lessors of the plaintiff the premises in question, as soon as the *Onondaga* commissioners should award the lot in which they were contained, to *Low*. Upon which, the court said, that the defendant had, *by his admissions*, recognized *Low* as his landlord, and could not, therefore, be allowed to dispute his title.

NEW-YORK,
Nov. 1808.
JACKSON
V.
SCISSAM.

In the case of *Jackson*, ex dem. *Sagoharie* and others, v. *Dobbin*, (ante, 223.) the court decided the very point now in question. It is there ruled, that an acknowledgment *by the defendant, that he went into possession under one of the lessors of the plaintiff, was sufficient to enable the plaintiff to recover. The same principle was fully recognized in the case of *Davies v. Pierce*, (2 Term Rep. 53.) It was there considered not as a new rule, but one long since settled.

[* 505]

In the case now before us, *Smith* was examined as a witness, and denied ever having made the acknowledgments imputed to him. Whether he or the other witnesses were most worthy of credit, was a question for the decision of the jury, and had they passed upon it, the verdict, perhaps, ought not to be disturbed. But the jury were expressly told, that the proof of *Smith's* tenancy was insufficient to entitle the plaintiff to recover. This broad direction was made on the ground, that *Smith's* acknowledgments, admitting them to have been made as testified on the part of the plaintiff, were not sufficient to entitle the plaintiff to a verdict.

In this respect, the jury was misdirected, and the verdict must be set aside. The costs are to abide the event of the suit.

VAN NESS, J., having formerly been concerned as counsel in the cause, declined giving any opinion.

New trial granted.

NEW-YORK,
Nov. 1808.

HOWES
v.
BARKER.

*HOWES against BARKER.

Where B., by articles of agreement, covenanted to sell and convey to H. a tract of land, at 9l. per acre, and a deed was accordingly executed, and the purchase-money paid according to the quantity of acres expressed in the deed, it was held, that no parol evidence was admissible (a) to show that there was a mistake in the quantity mentioned in the deed; and that an action for money had and received, to recover back the money paid for the number of acres alleged to be deficient, was not maintainable

THIS was an action of *assumpsit*. The declaration contained three counts. 1. For money had and received to the use of the plaintiff. 2. For money paid out and expended. 3. For money lent and advanced. The defendant pleaded *non assumpsit*. The cause was tried before Mr. Justice Thompson, at the Dutchess circuit, in September, 1807.

The plaintiff's counsel, on opening the cause to the jury, stated, that the plaintiff and defendant, on the 20th August, 1798, executed articles of agreement, under their hands and seals, by which the defendant agreed to sell and convey to the plaintiff, for the sum of *nine pounds* per acre, a certain parcel of land, mentioned in the agreement, and covenanted to execute a good warranty deed for the same, on or before the 1st day of April following, on the plaintiff's paying him for the land, at the terms agreed upon; that the defendant, afterwards, on the 1st April, 1799, executed a deed to the plaintiff, in the usual form, and with the usual covenants, in which the premises conveyed were described as containing 275 acres, exclusive of any allowance for highways, and the plaintiff paid to the defendant 6,187 dollars and 50 cents, being the price of 275 acres at 9l. per acre; that the premises mentioned in the agreement, and described and conveyed in the deed, on actual mensuration, afterwards, were found to contain only 263 acres, there being a deficiency of 12 acres; by means of which deficiency in the supposed quantity of the land, the defendant had paid by mistake, 270 dollars over and above the value of the land, at the rate agreed to be paid for the same; to recover which sum, with the interest thereon, the present action was brought. Upon this statement of the case, the defendant moved for a nonsuit, on the ground that the action was *not maintainable, and the judge was of opinion, on the facts disclosed, that no action could be sustained.

The plaintiff then offered to prove, that at the time the deed was executed, the defendant agreed with the plaintiff, that the quantity of acres conveyed, should be the subject of future inquiry, and that the sum paid should be rectified by the actual quantity of land; but this evidence was overruled by the judge.

The plaintiff then offered to prove that the defendant, after the execution of the deed, had acknowledged the mistake, and had promised to refund the money, so received by mistake, and for that purpose, produced a letter written by the defendant to

[* 507]

(a) *Winchell v. Latham*, 6 Cow. Rep 690.

the plaintiff, which was admitted and read, in which he says, "I will come down next week, and early enough in the day to send for Mr. Baldwin. All I want is to be convinced of the quantity of land, and Baldwin says he can do it." The judge being of opinion that neither the facts stated, nor the evidence produced, were sufficient to support the action, ordered the plaintiff to be called, and a nonsuit was accordingly entered.

A motion was afterwards made to set aside the nonsuit.

J. Tallmadge, for the plaintiff. The plaintiff does not complain of any breach of the agreement between him and the defendant, but admits that the deed was a complete fulfilment of that agreement. The present action is not brought to impeach or destroy the written agreement, or the subsequent deed. The plaintiff alleges that the defendant has received money, which he ought not in justice to retain, and the agreement is produced as evidence of that fact. If the plaintiff, on the ground of fraud or mistake, could find relief in a court of equity, there is no good reason why he should not obtain the same justice in a court of law, in this form of action. Fraud, or mistake, is as much a ground of relief in the one court, as in the other. Suppose a bond had been given for a prior debt, and it should be shown, that there had been an *error in the calculation of the sum expressed in the bond, would not a court of law correct the mistake? (*Sugden's Law of Vendors*, 119. 201. 2 *Equity Cases*, Ab. 698.)

NEW-YORK
Nov. 1808.

HOWES
v.
BARKER

Emott, contra. Parol evidence of conversations between parties, prior to a written agreement, are never admitted. Where there is a solemn deed or agreement in writing, no parol agreement can be set up, to alter or vary, in any manner, the written contract. (2 *Wm. Black.* 1239. 1 *Johns. Rep.* 414.) Admitting that there was a special agreement about the quantity of the land, to be estimated afterwards, it ought to have been declared on, that the defendant might come prepared to meet the plaintiff's demand. It would be improper to admit the evidence of such an agreement, under a general money count. The authorities cited show that a mistake of the kind alleged can never be rectified in a court of law, which has not power to afford adequate relief. The plaintiff is estopped in a court of law, to aver a mistake, in his own solemn deed. If he cannot allege a mistake in the deed, he cannot recover in a form of action grounded on such mistake. If there had been a fraud on the part of the defendant, and it could be fairly brought before the court, the plaintiff might, perhaps, find relief at law; but not in the present form of action. He must bring a special action on the case, stating the fraud, which must be fully proved. But the plaintiff does not pretend that

NEW YORK, there was any fraud, but grounds his claim wholly on the mistake.
Nov. 1808.

HOWES
v.
BARKER.

[* 509]

THOMPSON, J. Could the plaintiff's action in this case be sustained at law, without infringing upon what I consider well settled principles, I should think the nonsuit ought to be set aside; for if the facts offered to be proved were true, there has been a mistake made in the deed, which ought to be rectified. But relief, in my opinion, is not to be had in a court of law. There is no pretence of any fraud having been practised upon the plaintiff. The most that can be alleged is, that there has been a mistake with respect to the insertion of the consideration-money in the deed. The contract between the parties, according to the articles of agreement, was *executory*, and having been **executed*, and consummated, by the deed subsequently given, the agreement became null and of no further effect. If it remained in force, the action, if at all sustainable, should have been upon the covenant. This is not like the case of *Weaver v. Bentley*, (1 *Caines*, 48.) The court there sustained the action for money had and received, on the ground that the defendant having altogether failed to perform the contract, on his part, the plaintiff had his election, either to proceed on his covenant for damages, or to *disaffirm* the contract, and to bring his action to recover back the money he had paid. The present case, however, is not one where the plaintiff claims the right of disaffirming the contract, but has consummated it by the acceptance of a deed. The deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity. If so, the testimony offered in support of the plaintiff's action, to show that the consideration expressed in the deed was more than ought to have been paid, could be viewed in no other light, than as parol evidence, repugnant to the written contract. That such testimony is not admissible, has been repeatedly ruled in this court. (2 *Caines*, 161. 1 *Johns. Rep.* 418.) The language of the court, in those cases, was, that it cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and every thing resting in parol becomes thereby extinguished. I cannot perceive why any parol agreement, varying the consideration-money expressed in the deed, does not fall within this rule, as much as if it related to any other part of the contract. There is, however, an express adjudication of this court on that point, in the case of *Schemerhorn v. Vanderheyden*, (1 *Johns. Rep.* 140.) The court there say, "The consideration for the assignment is ex

390

pressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. To allow *of parol evidence for that purpose, would be to extend, or substantially vary, the language of a written contract. Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument, we must presume, that the father and son altered the consideration mentioned at first, and finally acted upon that which is set forth in the assignment." So in the case before us, we must presume, after the execution of the deed, that the consideration therein mentioned was the one finally agreed on between the parties. The testimony offered, to show an agreement, at the time the deed was executed, to have the land surveyed, and the price regulated by that survey, was properly rejected, as coming within the principle adopted by this court in the case of *Mumford v. M'Pherson*, (1 *Johns. Rep.* 414. See also *Bradley v. Blodget*, *Kirby's Rep.* 22.) The plaintiff was permitted on the trial to adduce testimony to show that the defendant had, after the execution of the deed, acknowledged the mistake, and promised to refund the money, but he altogether failed in establishing such a promise.

Whatever view, therefore, is taken of the case, I think the nonsuit ought to stand ; and that the present motion must be denied.

SPENCER, J., was of the same opinion.

KENT, Ch. J. I am of the same opinion. I confess that I have struggled hard, and with the strongest inclination, to see if the action for *money had and received* would not help the plaintiff in this case ; but I cannot surmount the impediment of the *deed*, which the plaintiff has accepted from the defendant, and which contains a specific consideration in money, and the quantity of acres conveyed, with the usual covenant of *seisin*. Sitting in a court of law, I think I am bound to look to that deed, as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed, and the price to be given for it. If there be a *mistake* in the deed, the plaintiff must resort to a court of equity, which has had a long established jurisdiction in all such *cases ; and where even parol evidence is held to be admissible to correct the mistake. (1 *Vesey*, 317. 3 *Bro. C. C.* 454. 5 *Vesey*, jun. 395, 596. 6 *Vesey*, jun. 333, 334.) The motion to set aside the nonsuit must be denied.

VAN NESS, J., having formerly been concerned as counsel in the cause, gave no opinion.

NEW-YORK,
Nov. 1808.

HOWES
V.
BARKER.
[* 510]

[* 511]

NEW-YORK,
Nov. 1808.

THE PEOPLE
v.
PETTIT

YATES, J., not having heard the argument in the cause, gave
no opinion.

Judgment of nonsuit —

THE PEOPLE *against* PETTIT

Where an indictment stated that the prisoner, with force and arms, to wit, with knives, hatchets, &c., made an assault upon E. G. with intent to commit murder upon him, and did then and there, cut, beat, strike, wound, and ill-treat the said E. G., to his damage, &c., and against the peace, &c., it was held to be sufficient. It is enough to state, with the usual precision, the facts necessary to constitute an assault and battery,

THIS cause came before the court, on the return to a *writ of error*, to the General Sessions of the county of *Rensselaer*. The indictment returned against the defendant stated, that the defendant, at, &c., with force of arms, to wit, with knives, hatchets, and tomahawks, in and upon *Elijah Guppin*, of, &c., in the peace of the people, then and there being, did make an assault, *and with intent to commit murder upon the said Elijah*, did then and there cut, beat, strike, wound, and evil treat him, the said *Elijah*, and other wrongs to the said *Elijah*, then and there did, to the damage of the said *Elijah*, and against the peace, &c. To this indictment the defendant pleaded not guilty, and was, in *October*, 1807, convicted and sentenced to three years' imprisonment in the state-prison.

The error assigned was, that the indictment was bad, in not setting forth, that the act was done feloniously, wilfully, and of malice aforethought, and in not accurately describing the instruments, &c., or, in other words, that it had not the precision requisite in an indictment for murder, and was nothing more than an indictment for an assault and battery.

[* 512]
and aver the intent with which it was made.

**Per Curiam.* The intent to commit murder was here charged in the words of the statute, and we think that was sufficient. The indictment is for an assault and battery, and the *quo animo* was to be collected from the circumstances. It was enough to state, with the usual precision, the facts requisite to constitute an assault and battery, and to aver the intent with which it was made. This intent might have been inferred and proved, from the declarations of the defendants previous to the assault. The indictment required no other facts than were necessary to establish an assault and battery. The crime charged was, after all, but a misdemeanor. It was not a felony, though the intent was to commit one.

We are, therefore, of opinion, that the judgment be affirmed

Judgment affirmed.

NEW-YORK,
Nov. 1808.JACKSON
v.
BUSH.JACKSON, *ex dem.* HEET and GOURLEY, *against* BUSH.

THIS was an action of *ejectment*, for part of lot No. 34, in the town of *Aurelius*, in the county of *Cayuga*. The cause was tried before Mr. Justice *Spencer* at the *Cayuga* circuit, in *July*, 1808.

Upon the trial, the plaintiff gave in evidence, a patent for the lot, to one *Christian Blue*: an act of the legislature, passed the 7th *April*, 1806, for the relief of *Heet*, one of the lessors of the plaintiff; and a patent for the premises, to *Heet*, from the commissioners of the land-office, in pursuance of the said act. He also proved, that *Blue* died before the 27th *March*, 1783, to wit, in the year 1781, without issue.

The defendant gave in evidence, a deed from one *John Hegeman* to *Austin* and *Tyler*, dated the 14th *December*, 1794, for 450 acres of the lot, including the premises, *and a deed from *Tyler* to the defendant, dated 15th *April*, 1803, for 120 acres, being the premises in question. The defendant was in possession prior to the 5th *April*, 1803, had paid a considerable part of the consideration-money, and had made large improvements prior to the 5th *April*, 1803. The jury gave a verdict for the plaintiff, and also found the *fact*, that the defendant had settled under color of a *bona fide* purchase, made prior to the 5th *April*, 1803. A question was reserved, whether the plaintiff should be permitted to sue out execution, until he had paid for the improvements, deducting a reasonable compensation for the use and occupation of the land.

A person who had settled on land, in the military tract, under color of a *bona fide* purchase, made prior to the 5th *April*, 1803, cannot be put out of possession, until he is paid for his improvements, according to the act of the 5th of *April*, 1803. (*Laws of N. Y.* v. 3, p. 399. sect. 2.)

[* 513]

Henry, for the plaintiff.

Richardson, for the defendant.

Per Curiam. The defendant is entitled to compensation for his improvements, as he brings his case within the 2d section of the act of the 5th *April*, 1803. The act of the 7th *April*, 1806, granting the lot to one of the lessors of the plaintiff, does not interfere with the provision in the act of 1803. It only vests the lot in *Heet*, as fully as if he had been the lawful heir of *Blue*; and assuming him to be such heir, he is, nevertheless, bound, by the former act, to pay for the improvements. The two acts can have full operation, without impairing the provisions of either.

Judgment for the plaintiff.

NEW-YORK,
Nov. 1808.

PEARSALL
v.
LAWRENCE
and DOE.

*PEARSALL *against* LAWRENCE and DOE, Bail of LAMB

Before a suit can be commenced against bail, a *ca. sa.* or *test. ca. sa.* against the principal, must be sued out and actually returned, with *non est inventus* endorsed thereon, and filed in the clerk's office.

THIS was an action of *debt*, on a recognizance of bail. The declaration was in the usual form. The defendant pleaded that the plaintiff ought not to have and maintain his action, &c., because that after the judgment against *Lamb*, the principal, and before the suing out of the *capias ad respondendum*, in this suit against the defendant, as bail of *Lamb*, there was no *capias ad satisfaciendum* or *testatum ca. sa.* issued against *Lamb*, upon the said judgment, directed to the sheriff of the county of *Delaware*, (in which county the said *Lamb* was arrested, by virtue of the process upon which the said judgment was had,) upon which *ca. sa.* or *test. ca. sa.*, such sheriff had returned that the said *Lamb* was not found, &c., wherefore he prayed judgment, &c.

The plaintiff replied that a *test. ca. sa.* was sued out on the judgment against *Lamb*, directed to the sheriff of the county of *Delaware*, returnable on *Friday*, the 6th day of *February*, 1807, and which was delivered, at least four days before the return thereof, to the under-sheriff of the county of *Delaware*, the defendant then being sheriff of the said county, upon which writ, the sheriff returned *non est inventus*, and which writ of *test. ca. sa.* with the said return endorsed thereon, was filed in the clerk's office, in *Albany*, on the 27th *February*, 1807, and that the *capias ad respondendum* in this cause was tested the 6th *February*, 1807, &c. The defendant rejoined, that the sheriff of *Delaware* did not return on the *test. ca. sa.* mentioned in the plaintiff's replication, that the said *Lamb* could not be found in his county, until the *capias ad respondendum*, mentioned in the said replication, had been sued out against the defendant as bail, and was returnable, to wit, until the 27th day of *February*, 1807, and this, &c.

[* 515]

*To this rejoinder there was a general demurrer, and joinder.

Sherwood and *Hawkins*, in support of the demurrer. The replication does not state that the *test. ca. sa.* was actually returned before the *capias ad respondendum* issued. It was four days in the sheriff's office, and the actual return, or filing, is matter of form. A *capias ad respondendum* may be issued against bail, on the same day that the *ca. sa.* against the principal is returnable. (1 *W. Black.* 393. 2 *Tidd*, (2d ed.) 1015, 1016.) The statute (*Laws of N. Y.* v. 1. p. 446.) does not require that the *ca. sa.* should be actually filed, before process can issue against bail. Suppose the sheriff does not file it with the clerk, is the plaintiff to be delayed in his proceedings against bail, by his negligence? Every writ is sup-

posed to be returned on the day it is made returnable. It is enough that the return appears on the *ca. sa.*, though it may not have been actually returned, until after the issuing of the *capias ad respondendum*. But the defendant in this case ought to be estopped from making this objection. He was the sheriff of the county, and ought not to be allowed to take advantage of his own *laches*.

NEW-YORK,
Nov. 1808.
PEARSALL
V.
LAWRENCE
and DOB

Henry, contra. The only question is, whether, by the statute, there should be a return in *fact* of the *ca. sa.* previous to the issuing of process against the bail, or only a return by relation. The statute was intended for the relief of bail, and to guard them against surprise. It declares, that "no suit shall be commenced upon any recognizance of bail, in any civil action, until a writ of *capias ad satisfaciendum*, or *testatum ca. sa.* shall have issued against the defendant in the original action, directed to the sheriff of the county, in which such defendant was arrested and taken, and such sheriff has returned thereon, that the said defendant was not found in his county; and if any action shall be commenced upon such recognizance, and it shall not appear on the trial, that a writ of *ca. sa.* or *test. ca. sa.* was so issued and returned, a verdict shall be found for the defendant." It is made the duty of the sheriff to endeavor to serve the writ on the defendant, notwithstanding any directions to the contrary from the plaintiff's attorney. The act is remedial, and was intended to prevent an existing practice, by which bail were often taken by surprise. It ought to have a liberal construction in favor of bail.

[* 516]

Again, the plaintiff cannot take a step in the cause, until the writ is actually returned. Until a return, in fact, it is impossible to know, with legal certainty, what the return is. While the writ is in the hands of the sheriff, and until it is actually filed in the clerk's office, he may make any return that he thinks proper, and it may be, that a return of *cepi corpus* may be endorsed. The sheriff, by the rules of the court, is allowed 20 days after term, to return and file his writs, and it cannot be imputed to him as a fault, that the writ was not returned on the day on which it was made returnable. In making this defence, therefore, the sheriff does not take advantage of his own wrong, for he has violated no duty, nor has he been guilty of any *laches*. The sheriff is not the only party, for *John Doe* is also a defendant.

THOMPSON, J., delivered the opinion of the court. This case comes before the court on a demurrer to the rejoinder. The action was in debt, on recognizance of bail. The question presented by the pleadings is, whether it be necessary that a return in *fact* of *non est inventus*, upon the *capias ad*

NEW-YORK,
No. 1808.

PEARSALL
V.
LAWRENCE
and DOE.

satisfaciendum against the principal, should be made previous to the commencement of a suit against the bail. The return day in the execution was past, but the rejoinder states, that the sheriff did not return *non est inventus* upon the *ca. sa.* until after the *capias* in the present suit was sued out. This the demurrer admits.

[* 517]

That it is indispensably necessary to sue out a *ca. sa.* against the principal, previous to commencing a suit against the bail, is not denied. This is the proper notice to the bail, that the plaintiff has made his election to proceed against the body, rather than the property, of the principal; and the reason of the rule is obviously, *that the bail ought to be enabled to ascertain what has been done upon the execution, in order to determine his own liability. This he could not do, while the sheriff has the execution in his possession, as he cannot know what the return upon it will be. The only question which appears to have created any doubts in cases of this kind is, whether an actual *filing*, as well as a return, was requisite. (1 *Black. Rep.* 393. *Lutw.* 1273. 1 *Lev.* 225. 2 *Crompt.* 75.) Our statute is explicit, that no suit shall be commenced upon any recognizance of bail, in any civil action, until a *capias*, or *testatum capias ad satisfaciendum*, shall have issued against the defendant, in the original action, directed to the sheriff of the county in which such defendant was arrested; and such sheriff *shall have returned thereon*, that the said defendant was not found within the county; (*Rev. Laws*, v. 1. p. 449.) and the want of such return is declared to be a substantial defence upon the trial against the bail. The issuing of the *ca. sa.* against the principal, is not mere matter of form, for the purpose of charging the bail. The sheriff is expressly required, to endeavor to serve it upon the defendant, in any directions which he may receive from the plaintiff or his attorney to the contrary notwithstanding.

The court are, therefore, of opinion, that the defendant must have judgment.

Judgment for the defendant.

NEW-YORK.
Nov. 1808.HOYT
v.
WILDFIRE.

*HOYT, Survivor, &c., against WILDFIRE.

THIS cause came before the court upon a return to a *certiorari*, directed to the Justices' Court in the city of New-York.

Wildfire declared against *Hoyt*, in the court below, in an action of trespass on the case, for the non-payment of wages due to him, as a seaman on board the ship *Hampton*, (*Skilling's*, master,) of which *Hoyt*, survivor of *Hoyt & Tom*, was owner. *Hoyt* pleaded *non assumpsit*, and on the trial, before the justices, *Wildfire* produced two seamen as witnesses, who were on board the same ship, and had like demands for wages against *Hoyt*. They were objected to, as incompetent, on the ground of interest, but were admitted by the court. The plaintiff below then called on the defendant for his shipping articles, who refused to produce them, alleging as a reason, that the suit was against the owner, and not against the master, who was absent, and must be supposed to have the articles, and because he had not had reasonable notice to produce them.

The further hearing of the cause was then postponed, from the 11th *August* to the 1st *September*, to give *Hoyt* an opportunity to produce the shipping articles. On that day the parties appeared, and *Hoyt* failing to produce the articles, *Wildfire* was allowed to give parol proof of their contents. He proved, that on the 9th *April*, 1806, he shipped on board the *Hampton*, as a seaman, by signing the usual shipping articles, on a voyage from *New-York* to *Bombay*, and from thence to *Canton*, and from *Canton* back again to *New-York*, at 18 dollars per month. The ship was loaded with pitch, tar, canvass, rigging, anchors, and other naval stores, being *contraband of war*. The ship left the port of *New-York*, and after being out about four months, and while on her direct course to *Bombay*, she was ordered to put into the *Isle of France*, under pretence of being in want of water. After being 48 hours out of her course to *Bombay*, and in her deviated route to the *Isle of France*, and in sight of the port in that island, she was, on the 1st *August*, 1805, captured by an *English* frigate, and the vessel and cargo were, afterwards, condemned. When the *Hampton* altered her course for the *Isle of France*, and at the time of her capture, she had plenty of water on

A seaman was hired for a voyage from *New-York* to *Bombay*, and from thence to *Canton*, and back to *New-York*. The ship was laden with articles contraband of war, and while, in the course of the voyage to *Bombay*, the master, under a pretence of a want of water, which was not true, in fact, deviated, in order to put into the *Isle of France*, and while proceeding in the route to that island, and out of the tract of the ostensible voyage, was captured by a *British* cruiser, and condemned. The seaman was put on board of the *English* frigate, and afterwards shipped to *London*, from whence he sailed.

[* 519]

ed to *Wilmington*, N. C., and from thence to *New-York*. In an action against the owner for wages, it was held, that he was entitled to his wages, according to the contract, from the time he shipped on board, until his

arrival in *New-York*, deducting such wages as he had earned and received during his absence.

One seaman is a competent witness, in a suit brought by another seaman for wages, earned on board of the same ship, though he may have a common interest with the plaintiff, as to the point in controversy. The objection goes only to his *credit*.

NEW-YORK

Nov. 1808.

HOYT

v.

WILDFIRE.

board, and was in no distress. The captain, when he was proceeding to the *Isle of France*, charged the crew to say in case the ship should be boarded by an *English* man of war, that they were putting in for want of water, when, in fact there were several casks concealed in the hold. The plaintiff below was put on board the *English* frigate, and, after being detained for some time, he left her, and sailed for *London* where he arrived on the 15th *April*, 1807. From *London* he came to *Wilmington*, and from thence to *New-York*, where he arrived about the 20th *August* following, after an absence of 16 months. From the time of his capture, until his return to *New-York*, he had been two months on wages, and had also received two months' wages in advance, at the commencement of the voyage.

Hoyt proved, that it was customary for a vessel to clear out for one port, when she was, in fact, destined for another ; that this practice made no difference as to seamen's wages, nor was it customary to acquaint seamen with the concealed port of destination.

The court below decided, that the act of Congress of 20th *July*, 1796, makes it obligatory upon the master of a ship, when he enters into a contract with a seaman, to go a voyage, not only to define the voyage particularly, but imposes the performance of it as a duty ; that this act is to be construed strictly ; that no custom can be set up to destroy or vary a contract entered into in good faith, under a statute ; that the contract here was not kept in good faith ; and that a deceit was practised upon the plaintiff, who was, therefore, entitled to judgment for his wages, according to the contract, from the time he shipped on board, until his return, deducting the sums paid in advance, and the wages received while in another service ; and a judgment was, accordingly, entered for the plaintiff below, for 213 dollars.

The cause was submitted to the court without argument.

KENT, Ch. J., delivered the opinion of the court. The general rule of maritime law is, that if freight be lost, during the course of the voyage, by a disaster or peril, arising from accident, or superior force, the seamen lose their wages ; but if the same be lost by the fraud or other wrongful act of the master, the reason of the rule does not apply. It is just, as well as agreeable to the maritime law, to distinguish between the cases, in which the services of the seamen have not been rendered, in consequence of the perils of the sea, and in which they have not been rendered, by reason of the act of the master or owner. If a seaman be wrongfully discharged from the service, his wages will still continue down to the termination of the voyage. (*Abbott*, 354.)

So if the voyage be interrupted and lost, by the act of the master or owner, the seamen have a valid claim for an adequate compensation. The maritime ordinance of *Lewis XIV.* (*des Loyers des Matelots*, art. 3.) provides for this case, by ordaining, that if the voyage be broken up, after it has commenced, by the act of the owner or master, the seamen hired for the voyage shall be paid their entire wages for the voyage, and those hired by the month, the wages due for the time they had served, and for the time necessary to enable them to return to the port of departure. "The master," says *Pothier*, in his remarks on this article, (*Language des Matelots*, n. 203.) "ought not *to be discharged from his engagements, because the breaking up of the voyage was his own act, and a debtor cannot, by his own act, discharge himself of his obligation." The judgment in the court below was conformable to this rule of the *French* law; and the rule on this subject in the *English* law does not, as I apprehend, differ from the marine law of *France*, though I have not met with any adjudged case that is in point, and a recent *nisi prius* decision looks strongly the other way.

In *Eaken v. Thorn*, (*Abbott*, 3d ed. 444. 5 *Esp. N. P.* 6.) it was ruled by Lord *Ellenborough*, that if a ship be not seaworthy when she sails, and the voyage is lost by that means, the seamen cannot recover their wages; for the rule is general, that the ship must perform her voyage to entitle the seamen to wages, and the neglect of the owner, in sending out an unseaworthy ship, might be the object of a special action on the case. Whether the loss of freight, by reason of the want of seaworthiness in the vessel, forms one of the exceptions, I am not prepared to say; but the rule that the voyage must be performed, is certainly not universal, and without exception. A voyage lost by the fraud or misconduct of the master, and that so palpable as not to be denied, is not within the reason of the maxim, that freight is the mother of wages. The policy of the rule was well and distinctly assigned in a case in 1 *Sid.* 179. where it was held, that if the ship perish by tempest, enemies, fire, &c. the mariners lose their wages, "for if the mariners were to have their wages in those cases, they would not use their endeavors, nor hazard their lives for the safety of the ship." The counsel for the plaintiff, in the case of *Abernethy v. Landale*, (*Doug.* 539.) stated it to have been held, that if a ship be seized for debt, or for having contraband goods on board, the sailors had a right to their wages; up to the time of the seizure. What decision or authority was alluded to, does not appear: but this is undoubtedly the settled doctrine in the treatises on the *English* marine law. In "the discourse of owners and masters of ships and *mariners," contained in the "sea-laws," p. 457, it is stated as the rule of law, that "if a

NEW-YORK,
Nov. 1808.HOYT
V.
WILDFIRE.

[* 521]

[* 522]

NEW-YORK,

Nov. 1863.

HOYT
v.
WILDFIRE

ship happens to be seized for debt, or otherwise to become forfeited, the mariners must receive wages, unless in some cases where the wages are forfeited as well as the ship; as if they have letters of marque, and instead of that, they commit piracy; by reason of which there ensues a forfeiture of all. But lading prohibited goods on board a ship, as wool and the like, though it subjects the vessel to a forfeiture, yet it does not deprive the mariner of his wages; for the mariners having honestly performed their parts, the ship is tacitly obliged for their wages."^(a) The same doctrine is maintained in *Malynes's Lex Mercatoria*, (p. 105.) and in the collection of sea-laws annexed to *Malynes*.

We may, therefore, consider this as a rule of the marine law, both in *France* and *England*.

[* 523]

The act of the master, in sailing to the *Isle of France*, with articles contraband of war, under the pretence of a want of water, was a fraudulent act, and, from the testimony in the case, there is every reason to conclude, that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not kept in good faith, *and, as the court below observed, a deceit was practised upon the plaintiff. The ship and freight were justly lost, by a wilful violation of neutral duty; and the plaintiff below had the soundest claim upon the owner, for the equitable compensation which was allowed to him.

A question was made in the court below, whether the other seamen, who had a common interest in the point in contest, were competent witnesses. The fact would, no doubt, work strongly against the credit of their testimony, and they have been held incompetent in a court of admiralty. (1 *Peters's Adm. Dec.* 211.) But as they were not directly interested in the event of the suit, they were competent witnesses, by the rules of this court.

We are, therefore, of opinion, that the judgment below must be affirmed.

Judgment affirmed.

(a) These are the words of *Molloy*, in his treatise *de jure Mari'timo*, (v. 1. p. 354. b. 2. c. 3. sect. 7.)

Roccus seems to think that the seamen are entitled to their stipulated wages, if the voyage is not performed, provided they have been guilty of no fault, by which their wages would be forfeited. *Salarium nautæ debetur, quando navis magister ante tempus conventionis compulsum, licentiam ei dederit, aut eum in terram reliquerit et per eum servire non steterit. Item debetur nautæ salarium conventum cum magistro navis, etiam si magister non naviget ex casu fortuito, et sine culpa ipsius magistri, licet nauta non serviat, dummodo ipse nauta absque licentia magistri navem non derelinquat.* (*De nar. d. nautæ*. no. 43.)

The principle that the seaman is entitled to his full wages, though he does not perform the voyage, when the defect of service is not imputable to his fault, or where the loss of the ship or service is owing to the fault or misconduct of the owner, is recognized by Judge *Peters*, in several cases which came before him in the District Court of *Pennsylvania* (*Peters's Adm. Dec.* v. 1. p. 118. 122. 193. 276. and note, p. 481.)

READ *against* MARKLE.NEW-YORK,
Nov. 1808.READ
V.
MARKLE.

THIS was an action of *trover*, for a quantity of wheat, in the sheaf, and a quantity of hay. The declaration was entitled of *February* term, 1807, and alleged the conversion to have been on the 1st *November*, 1802. The defendant pleaded not guilty, and the statute of limitations. There was a general replication to the second plea, and issue taken thereon.

The cause was tried at the *Herkimer* circuit, before the chief justice, the 30th *May*, 1808.

On the 24th *August*, 1799, the sheriff of *Herkimer* county took the property in question by virtue of a writ of *fiery facias*, issued out of this court, in favor of one *Peter Smith*, against the present plaintiff and one *William Tater*, and having sold it, paid the money to the defendant, by whose order, and for whose benefit the sale was made. It appeared also, from a certified copy of a rule entered in this court, which was admitted in evidence, *that on the 14th *November*, 1802, the *fiery facias* above-mentioned, and all the proceedings thereon, so far as related to the money levied for the use of the defendant, were ordered to be set aside, for irregularity. Two objections were made, at the trial, on the part of the defendants.

Goods were taken on an execution, which was afterwards set aside for irregularity, an action of *trover* was brought, and the defendant pleaded the statute of limitations. It was held, that the execution, being irregular, was a nullity, and that the time when the statute began to operate, was from the first taking of the goods; and

[* 524]
not from the time when the execution was set aside.

1. That the statute of limitations must run from the time when the property was taken and sold under the execution, and not from the time it was vacated; and that the rule for vacating the *fiery facias*, ought not to have been admitted in evidence, under the general replication, but the fact should have been replied to specially. The judge overruled both these objections, and the jury, under his direction, found a verdict for the plaintiff.

A motion was made to set aside the verdict.

Van Vechten, for the defendant. The conversion of the property was in *August*, 1799, the time when the sheriff, by direction of the defendant, sold the goods. The conversion is the gist of the action. The statute of limitations ought, therefore, to be considered as beginning to operate at the time when the plaintiff's right of action accrued. Thus, in an analogous case, where a statute required that an action, against any person acting under the revenue laws, should be commenced within three months next after the matter or thing done, which was the cause of the action, it was held, that the limitation commenced from the time of the original seizure by the officer, though a suit was pending in the *Exchequer*, as to the right of seizure. (2 *H. Black.* 14. 2 *East*, 254.) The execution, having

NEW-YORK,
Nov. 1893.

READ
v.
MARKLE.

been set aside for irregularity, must be considered as void, and a nullity from the beginning. (3 Wils. 345.) It is the same as if no execution had ever existed. But admitting the execution to be merely erroneous, the plaintiff ought to be barred, for he should have applied at the next term to set it aside. Setting aside the *feri facias* for irregularity destroys the defence under it.

[* 525]

Again, the rule of court ought not to have been received in evidence under the general replication, but should have been specially pleaded. The statute operates in all cases not within the exceptions; (2 Wils. 420.) and where it is pleaded, the matter which is to take the case out of the operation of the statute must be specially replied. (2 Sellon, 468.)

Gold, contra. Courts have manifested a disposition to prevent the operation of the statute as far as possible, by laying hold of slight circumstances, that may save the right of the plaintiff. In trover, if goods are left in the hands of another, the statute of limitations does not run from the time of delivery, but from that of the demand and refusal. (1 Esp. Cas. 20.) The cause or right of action must be complete and perfect before the statute begins to operate. (4 Bac. Abr. 474. Limit. D.) Thus, where a person, in consideration that another would deliver him a deed, promises to redeliver it on request, the cause of action does not arise on the promise, or delivery of the deed, but upon the refusal to redeliver it, after the request. Until the execution was set aside, the plaintiff could have no right of action. If a party sues out an execution on a judgment, after a year and a day, without a previous *scire facias*, no action of trespass lies against him, for the process is held voidable only. (3 Caines, 270, 271.) Process may be considered as void or voidable, according to the circumstances of the case, and for different purposes. It may be considered as voidable, so as to enable a party to defend himself against the irregularity, without its being a nullity, as it regards the statute of limitations.

The doctrine as to the replication is not applicable to torts, but if it should be so considered, the plaintiff ought to be allowed to amend.

SPENCER, J., delivered the opinion of the court. It is expressly stated in the case, that the execution was set aside for irregularity; if so, this case is not distinguishable from that of *Parsons v. Lloyd*, (3 Wils. 345.) In that case, the court distinguished between erroneous and irregular process; the latter they held to be void and a nullity from the beginning; that, under the first, a party might justify until it be reversed, but not under an irregular process, because it was his own fault.

that it was irregular and void at first. The execution issued in favor *of *Smith* and *Tater*, against the plaintiff, being admitted to be irregular and unexplained, is to be considered as void. The plaintiff's action, therefore, accrued when the goods were first taken; and the plaintiff, having delayed to bring a suit within six years from the time of the trespass, is undoubtedly barred by the statute. We forbear to consider the other point, because it is unnecessary to the decision of the cause. The defendant is entitled to a new trial, with costs to abide the event of the suit.

New trial granted.

NEW-YORK
Nov. 1808.

CLOSE
V.
GILLESPEY.
[* 523]

CLOSE against GILLESPEY.

A JUDGMENT had been entered up, in this cause, on a warrant of attorney. The judgment was regularly signed and docketed; but, through mistake, the name of the defendant's attorney was not signed to the plea, filed with the other papers, nor was his name inserted in the roll. Execution had been issued by the plaintiff, and also by one *Mancius*, who had obtained a subsequent judgment against the defendant. Both executions were delivered to the sheriff, and each claimed a preference; but the plaintiff's execution was first received by the sheriff.

A motion was made, on behalf of the plaintiff, to amend the record, *nunc pro tunc*, by adding the name of the defendant's attorney to the plea on file, and by inserting it in the record.

P. S. Lush, Foot, and Skinner, for the plaintiff, cited 1 *Strange*, 114. 445. 641. 4 *Burr*. 2446. 1 *Saund*. 247. 3 *Caines*, 267.

Henry and *Van Vechten*, contra.

SPENCER, J., delivered the opinion of the court. There can be no doubt that an amendment is proper, and ought to be granted; but whether *nunc pro tunc*, so as to give a preference to the plaintiff's execution, is the question.

*In the case of *Seaman* and others v. *Drake*, (1 *Caines*, 9.) this court ordered an amendment to be made *nunc pro tunc*, in a judgment, after the lapse of several terms, where the clerk who taxed the costs had neglected to sign the roll, he having regularly docketed the judgment, and this was against bail. It

A judgment had been entered upon a warrant of attorney, and the same was regularly signed and docketed; but by the negligence of the attorney, the plea of the defendant was not signed, nor was the name of the defendant's attorney inserted in the record: The plaintiff was allowed to amend the record, *nunc pro tunc*, though a subsequent judgment had been entered up against the defendant, on which a preference was claimed.

[* 527]

NEW-YORK,
Nov. 1803.

FLEMING
v.
GILBERT.

was done on the principle, that the omission proceeded from an officer of the court. So the Court of K. B. in *England*, have permitted amendments, rendered necessary by the mistake of one of their attorneys. (4 *Burr.* 2449.) I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney, or by that of the clerk. Both are equally officers of the court.

In the present case, the judgment having been docketed, *Mancius* had, in legal intendment, notice of it, and it does not appear that his debt has been contracted since the entry of *Close's* judgment. Had error been brought, there might have been more doubt. I cannot perceive that *Mancius* has any right to avail himself of the irregularity which has intervened. Nor can I perceive that our right to amend, in case of the mistake of one of our officers, is to be controlled by the effect which may be produced in another case. All amendments affect, more or less, third persons.

The court are of opinion, that the motion ought to be granted.

Rule granted.

[* 529]

*FLEMING against GILBERT.

The time of the performance of the condition of a bond may be enlarged by a *parol* agreement of the parties; and where certain acts were done by the obligor, amounting to a substantial, though not to a literal, performance of the condition, it was held, that evidence of a *parol* agreement of the obligee, to waive any further performance, was admissible. (a)

Where the cause of action is trifling, and the plaintiff recovers only nominal damages, the court will not set aside a verdict for the misdirection of the judge, if the plaintiff will elect to discontinue, without costs. (b)

(a) *Langworthy v. Smith*, 2 *Wend. Rep.* 587. *Pearl v. Wells*, 6 *Wend. Rep.* 291. *Frost v. Everett*, 5 *Cow. Rep.* 497. *Ex parte Bailey*, 2 *Cow. Rep.* 479, and the cases cited in note a. See *Dancy v. Deby*, 20 *Johns.* 462.

(b) See 5 *Wend. Rep.* 40

defendant offered to prove, that on the 20th *December*, 1806, he procured the bond and mortgage mentioned in the condition of the bond, on which the present action was brought, and on the same day tendered them to the plaintiff, and offered to do any act which he should require, for the further discharge of the bond and mortgage, and the plaintiff, not being advised what further acts were necessary to be done by the defendant, in order to discharge the bond and mortgage, agreed that the defendant might deposit the same with one *Judson Curtiss*, with whom the plaintiff agreed to deposit the bond given by the defendant, which were to be delivered to the respective parties, as soon as the defendant should perform such further directions as the plaintiff should give to the said *Curtiss*, relative to the discharge of the mortgage; that, in pursuance of this agreement, the defendant, on the 1st *January*, 1807, deposited the bond and mortgage with *Curtiss*, but the plaintiff did not deposit the defendant's bond with him, or give any further directions as to the bond and mortgage.

NEW-YORK
Nov. 1808.

FLEMING
V.
GILBERT.

*The defendant further offered to prove, that the plaintiff agreed, on the 20th *December*, 1806, that the defendant might deposit the bond and mortgage with *Curtiss*, any time before the 1st *June*, 1807; that soon after the 3d *November*, 1806, and before any money was due on the mortgage, the plaintiff surrendered the deed he had received for the mortgaged premises from *Isaiah Gilbert*, (to whom the mortgage was given for the original consideration-money,) to him, and that *I. G.*, by request of the plaintiff, and pursuant to an agreement between the plaintiff and one *Seely*, for the sale of the premises, conveyed the premises to *Seely*, who preferred that mode of conveyance, to receiving a deed from the plaintiff; by which arrangement, made between all the parties, the mortgage was satisfied, and the plaintiff divested of all interest in the mortgaged premises, and could not be prejudiced by the bond and mortgage, which, however, were produced and offered to be delivered to the plaintiff at the trial. All this evidence was overruled by the judge, as matter of defence, but was allowed to go to the jury, in mitigation of damages.

[* 529]

The jury, under the direction of the judge, found a verdict for the plaintiff, for *six cents* damages.

A motion was made to set aside the verdict, and for a new trial.

Gold, for the defendant. It was competent to the defendant to set up the parol agreement, to enlarge the time of performing the condition of the bond, or to waive its performance altogether. No objection, as to surprise, could be made, as the whole agreement was stated in the notice annexed to the plea. (1 *Esp. Cas.* 35. See also *Keating v. Price*, 1 *Johns.*

NEW-YORK,
Nov. 1808.

FLEMING
v.
GILBERT

[* 530]

Cas. 22. 1 Vernon, 240. Ves. 376.) Where one party covenants to perform a certain thing, and the other stops him, or prevents the performance, it is sufficient; he need not proceed further. (*Doug. 694. 1 Term Rep. 638. 545.*) A tender to perform, in such case, is equivalent to a performance, and no action will lie for a breach of the covenant.

*The plaintiff, then, had no right to recover for the breach of a condition, the performance of which was waived by his own act, and from the non-performance of which, he had suffered no damage whatever. There was a misdirection of the judge, and though the damages are trifling, there ought to be a new trial.

In the case of *Wilson v. Rastall*, (4 *Term Rep.* 753. But see *ante*, 239. *Hyatt v. Wood.*) Lord *Kenyon* decided, that a new trial was never refused where there had been a misdirection or mistake of the judge.

Platt, contra, insisted, that this was an attempt to defeat a bond by a mere *parol* and *executory* agreement, which could never be done. *Accord and satisfaction* is the only bar. A mere *accord*, or *executory* agreement, is no bar. (1 *Bac. Abr.* 43.) The plaintiff's right of action on the bond was perfect at law; and the special matter offered in evidence could only go in mitigation of damages. The notice of the agreement was also defective, and not according to the statute, which intended that such notices should be as explicit and certain as a special plea, so that the opposite party might come prepared to meet it. It did not appear that the mortgage had been cancelled as the act requires.

As the damages were nominal, the court will not grant a new trial, for it has been repeatedly decided, that where the cause of action is trivial, a second trial will not be granted. (1 *Johns. Rep.* 287. 3 *Johns. Rep.* 239. 1 *Johns. Cases* 250—255.)

THOMPSON, J., delivered the opinion of the court. The first question presented by this case is, whether the facts set forth in the notice, under the defendant's plea, afford a valid defence to the present suit. I am inclined to think that they do. The condition of the bond substantially is, that the defendant should, by a certain day, procure and deliver to the plaintiff, a bond and mortgage which he had given to *Isaiah Gilbert*, and to discharge the same from the record. The defendant, within the time limited, did procure the bond and mortgage, and tendered, and offered them to the plaintiff; and did also offer to do whatever the plaintiff should require for the further discharge of the bond and mortgage, or the record thereof; but the plaintiff, *not knowing at that time what was further

[* 531]

necessary, did discharge the defendant from the strict and literal performance of the bond, and entered into another engagement respecting the further proceedings. The plaintiff's conduct can be viewed in no other light than as a waiver of a compliance with the condition of the bond, so far as it related to a discharge of the mortgage on record; and I see no infringement of any rule or principle of law, in permitting parol evidence of such waiver. It is a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond. We find the rule above alluded to, recognized in ancient as well as in modern decisions. Thus, where the condition of a bond was to raise a mill, the obligor came to the obligee, and told him every thing was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it, and discharged him entirely of the erecting of the mill, and that was held sufficient to excuse him from the performance. (1 *Roll. Abr.* 453. pl. 5. *Year Book*, 2 *Hen.* VI. 37.)

So, also, in an action of covenant upon a charter-party, for demurrage, where it appeared that the ship-owner had waived all claim to demurrage, and consented that the time should be enlarged within which the cargo was to be discharged, Lord *Kenyon* said, that if the matter had been properly pleaded, it would have been a good and legal defence against any claim for demurrage. (1 *Exp. Cas.* 35.)

Upon the same principle, it is held that a tender and refusal, or waiver, (which must always rest in parol,) is equivalent to an actual performance; (1 *Stra.* 535. *Doug.* 661.) and in *Keating v. Price*, (1 *Johns. Cas.* 23.) this *court allowed evidence of a parol agreement to enlarge the time of performance of a written contract.

There was, accordingly, a misdirection at the trial, in overruling the testimony offered as a defence to the suit; but as the recovery is but nominal, and the only contest now is respecting the costs of the suit, it cannot be advisable that there should be a new trial, merely to give the defendant an opportunity to obtain, by a verdict, the costs already accrued, together with the costs of such new trial. It appears, therefore, to be proper that the motion for a new trial should be granted, with this *proviso*, that the plaintiff may elect, by the first day of the next term, to discontinue without costs.

The court has frequently decided, (*ante*, 241. and the cases there referred to,) that it would not, upon any strictly legal or

NEW YORK,
Nov. 1808.

FLEMING
V.
GILBERT

[* 532]

NEW-YORK,
Nov. 1808.

FLEMING
v.
GILBERT.

technical objection, taken by the party moving, set aside a verdict or nonsuit, and grant a new trial, when there could be no other object in view than to obtain nominal damages. Two of the cases there referred to, were actions of trespass, but the same principle applies to this case; and if the plaintiff will abandon the verdict he has obtained, it cannot be fit or discreet to add the trouble and expense of a new trial, in order to give the defendant the benefit of a verdict for costs. The *English* courts exercise their discretion on the subject of new trials, under the same rules.

In *Deerly v. Duchess of Mazarine*, (2 *Salk.* 646.) the court refused to grant a new trial, though the verdict was clearly against law, because they held it to be agreeable to the justice of the case.

In *Macrow v. Hull*, (1 *Burr.* 11.) the defendant obtained a verdict directly against evidence and the strict point of law, but the court would not interfere, because the trespass was trifling and frivolous, and the damages only nominal: And in another case, soon after, (1 *Burr.* 54.) Lord *Mansfield* held, that a new trial ought not to be granted to gratify litigious passions, upon every point of *summum jus*. These were cases where the jury had disregarded the evidence, and the law arising on it; but the same reason and the same rule apply, where the misdirection of the judge had influenced the verdict. It is not the source from whence the mistake originates, but the equity of the verdict in the one case, and the trifling and vexatious object of the new trial in the other, that prevents the interference of the court.

In *Edmundson v. Machell*, (2 *Term Rep.* 4.) the Court of K. B. decided that they would not grant a new trial on a technical objection, in point of law, to the direction of the judge, when they saw justice had been done, though the misdirection, in that instance, clearly swayed the jury. When a question on a misdirection arises, the first inquiry is, whether it was in a material point, and affected the merits of the case. The court always makes this inquiry, (3 *East*, 455. 8 *East*, 352.) and they are bound, in the exercise of a sound discretion, so to do; otherwise, there would be no end to new trials, and the remedy would be worse than the disease. "Is the court necessarily to grant a new trial," says Lord Ch. *Eldon*, (8 *Vesey*, jun. 169.) "if material evidence was rejected? or is it not at liberty, supposing it material, to consider in what degree it is so; and whether the materiality is such, that, because it was rejected, a new trial must be granted?" We think, therefore, that a new trial ought not to be granted, if the plaintiff will waive the verdict

[* 533]

Rule granted, *conditionally*.

NEW-YORK,
Nov. 1808.BRUCE
v.
PEARSON.*BRUCE and BRUCE *against* PEARSON.

THIS was an action of *assumpsit*, for goods sold and delivered. The cause was tried at the last sittings in *New-York*, before Mr. Justice *Van Ness*.

On the 11th *December*, 1805, the defendant, who resides at *Albany*, wrote a letter to the plaintiffs, who are merchants in the city of *New-York*, as follows:—

“ *Albany*, 11th *December*, 1805.

Gent.

“ Should you find it perfectly agreeable to yourselves, (not otherwise,) you can send me by any sloop, provided you think the river will keep open, the goods I have noted at foot, and payable the 15th *May* next. If you think the time too long, you need not send them.”

The goods mentioned were, “ 6 hogsheads rum ; 1 hogshead sugar ; 1 pipe gin ; 1 pipe brandy ; 4 quarter-chests hyson-skin tea ; 20 or 40 small boxes pipes, if low ; 10 barrels of codfish.”

The plaintiffs, on the 21st *December*, 1805, shipped on board of a sloop, for the defendant, “ 3 hogsheads rum ; 1 pipe brandy ; 2 chests tea ; 1 hogshead sugar, and 1 pipe of gin.” At the bottom of the bill were these words : “ At three months : interest after, till paid.”

They also wrote to the defendant as follows:—

“ *Dear Sir*,

“ Your much esteemed favor of the 11th inst. we only received on the 19th. We were much at a loss to know how to act ; we, however, have calculated to risk the getting up, and have reduced the order, and shipped per the *Fair Play*, as on the other side.”

The vessel having the goods on board (the river being much obstructed with ice) was, during her passage, cast away, and part of the goods wholly lost. The master, on the 8th *January*, 1806, having left the vessel, went to *Albany*, and delivered the letter of the plaintiffs to the defendant, *who, having read it, said that he did not consider the goods as his, as the plaintiffs had not sent *all* the goods ordered, nor on the terms proposed. On the same day, the defendant wrote to the plaintiffs, inform-

If a person sends an order to a merchant, to send him a particular quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods, at a shorter credit, and the goods sent are lost by the way, the merchant must bear the loss, for there is no contract, express or implied, between the parties. (a)

[* 535]

NEW-YORK,
Nov. 1803.

BRUCE
v.
PEARSON.

ing them, that the vessel was ashore, and that he did not consider the goods at his risk, and advising them to give directions for their preservation, offering, if the plaintiffs considered him as liable, to leave the question to be decided by arbitrators.

The goods were charged at the market price of goods, at three months credit.

The plaintiffs offered to prove, that the defendant had frequently, prior to the 11th *December*, 1804, sent orders to the plaintiffs for goods, which were executed only in part, and that the defendant had always received the goods sent, without making any objection; and that it was a general usage among merchants in the city of *New-York*, to send to their customers in the country, a part only of the goods ordered; but this evidence was objected to, and overruled. The judge was about to order the plaintiffs to be called, when the counsel agreed that a verdict might be taken for the plaintiffs, subject to the opinion of the court on a case containing the facts above stated; and that, if the opinion of the court should be in favor of the defendant, a nonsuit should be entered.

The case was now argued by *D. B. Ogden* and *Boyd*, for the plaintiffs; and

P. W. Radcliff, and *J. Radcliff*, for the defendant.

Per Curiam. The order sent by the defendant to the plaintiffs was for 6 hogsheads of rum, and other articles, at a credit of six months; and the plaintiffs sent only 3 hogsheads, and omitted part of the other articles, charging those sent, at a credit of three months. This cannot amount to a *contract*. There is no agreement, no *aggregatio mentium* between the parties, as to the thing, or subject matter of the contract. The defendant wished to have *the whole of the goods; a part of them might be of no use; and until he assented to receive a part instead of the whole, he cannot be said to have contracted to pay for a part; and there can be no *implied assumpsit* to pay, as the goods sent never came to his hands.

[* 536]

Judgment of nonsuit.

NEW-YORK,
Nov. 1808.HACKLEY
v.
PATRICK.HACKLEY, Survivor, &c., against PATRICK, impleaded
with HASTIE.

THIS was an action of *assumpsit*, for goods sold and delivered, money lent, and money had and received. The cause was tried at the last sittings held in *New-York*.

Patrick and *Hastie* entered into copartnership in 1800, and carried on their business in the city of *New-York*. On the 31st December, 1801, they dissolved their partnership, and a notice of the dissolution was published in the gazettes of the city, in the following words: "Notice. The mercantile concern, under the firm of *Henry Hastie & Co.* expired on the 31st ultimo, by its own limitation. All persons having any unsettled business with them, will please to call on the subscriber, at No. 103, *Water street*, for an adjustment of the same. In future, the business will be carried on by *Henry Hastie*."

If one partner, who is authorized to adjust the debts due from the copartnership, after its dissolution, adjusts an account, and acknowledges a balance to be due from the copartnership, this acknowledgment will not bind his copartner. (a)

" *Henry Hastie*."

" January 7th, 1802."

The plaintiff exhibited an account against *Henry Hastie & Co.* dated April 11, 1804, on which was endorsed an acknowledgment, subscribed by *Henry Hastie*, in his own name, as follows:—

" *Norfolk*, April 18, 1805.

" If the dates in the within account are correct, antecedent to the dissolution of the copartnership of *Henry Hastie & Co.* that concern owes *Richard S. Hackley & Co.* *1034 dollars, and they owe me 289 dollars and 37 cents, which deduct from that balance, will leave *Henry Hastie & Co.* in their debt, principal, 744 dollars and 37 cents."

[* 531]

The counsel for the defendant objected to this acknowledgment, as evidence to charge the defendant, but it was admitted by the judge. The defendant's counsel then insisted that the plaintiff should prove that the dates in the account, prior to the dissolution of the copartnership of *Henry Hastie & Co.* were correct; but the judge said that it was unnecessary, as the burden of proof lay with the defendant to show their incorrectness; and that the acknowledgment of *Hastie*, of the balance on that account, if the dates were correct, was conclusive evidence against the defendant in the cause.

(a) *Walden v. Sherburne*, 15 Johns. 424. *Hopkins v. Banks*, 7 Cow. Rep. 650. *Gleason v. Clark*, *Baker v. Stackpoole*, 9 Cow. 51. 420. *Hammon v. Huntly*, 4 Cow. Rep. 493.

NEW-YORK,
Nov. 1898.

HACKLEY
v.
PATRICK.

The jury found a verdict for the plaintiff, for the balance there stated, and the interest thereon.

A motion was now made to set aside the verdict, and for a new trial, for the misdirection of the judge.

Mulligan, for the defendants, contended, that it had been repeatedly decided, that the power of one partner to bind the other, ceased with the dissolution of the partnership, and that if one partner could not give or endorse a promissory note, in the name of the partnership, after its dissolution, he could not, for the same reason, by his acknowledgment of an account, charge his copartner. He cited *Lansing v. Gaine* and *Ten Eyck*, 2 *Johns. Rep.* 300. 3 *Esp. Cases*, 108.

Colden, contra, insisted, that it would be extremely inconvenient, if a partner, after the dissolution of the firm, was not allowed to adjust an account, and bind his copartner for the balance he admitted to be due. It is true, that one partner cannot, after the dissolution of the copartnership, bind his copartner by a new contract; but where he is expressly authorized to settle the debts of the former copartnership, he may bind his copartner in relation to such debts. (1 *Hen. Black.* 155.) The authority of *Hastie* was not only implied, but express; and *Patrick* ought, therefore, to be *bound by his acts, in relation to former debts, which he was empowered to adjust.

[* 538]

Wells, in reply, was stopped by the court.

Per Curiam. This is a clear case. After a dissolution of a copartnership, the power of one party to bind the others wholly ceases. There is no reason why his *acknowledgment* of an account should bind his copartners any more than his giving a promissory note in the name of the firm, or any other act. The plaintiff ought to have produced further evidence of the debt; the acknowledgment of *Hastie* alone was not sufficient to charge *Patrick*.

There must be a new trial with costs to abide the event of the suit.

New trial granted.

NEW-YORK
Nov. 1801.MONTGOMERY
v.
HASBROUCKMONTGOMERY *against* HASBROUCK and others.

A *CAPIAS AD RESPONDENDUM* was issued, at the suit of the plaintiff, against *James Hasbrouck, Conrad E. Elmendorf, Daniel Lewis*, and *seven* others, to answer in a *plea of trespass*, returnable at the last *May* term. The writ contained no *ac etiam* clause, and all the defendants, except *Lewis*, having been taken, their appearance was endorsed on the writ, as is usual, where defendants are not held to bail.

A declaration was filed against all the defendants, who had thus endorsed their appearance, except *Conrad E. Elmendorf*; and a default and interlocutory judgment was afterwards duly entered for want of a plea.

C. E. Elmendorf, for the defendants, now moved to set aside the proceedings in the cause for irregularity. He contended, that there was a variance between the writ and the declaration, as the name of one of the defendants taken on the *capias* had been omitted in the declaration. He cited 1 *Sellon*, 255. 2 *Wils.* 85.

Slosson, contra. The mode of proceeding by bill in trespass, is derived from the practice of the *English* Court of K. B., where it has been long settled, that when the *defendant is once brought into court by the process in trespass, you may declare against him for any other species of injury. (1 *Tidd.* 13. 7 *H.* VI. 42. 22 *H.* VI. 24.) The object of the process is merely to bring the party into court. In all actions not bailable, or where the cause of action is not specified in the writ, the plaintiff may proceed against all or any of the defendants brought into court.

In the case of *Holland v. Johnson*, (4 *Term Rep.* 695.) the Court of K. B., in *England*, decided, that the plaintiff might join four defendants in one writ, and sever the subsequent proceedings against them. And in *Stables v. Ashley* and others, (1 *Bos. & Pull.* 49.) in the C. B., the court said that they would not countenance such an objection as is now made, unless they were bound by the strictest authority; and they held the distinction to be, between process bailable and not bailable; and that in the latter, the plaintiff may declare against one defendant, though several are named in the writ. This distinction was also recognized by the Court of K. B. in the case of *Yardley v. Burgess*, (4 *Term Rep.* 697. in note.) In

In an action not bailable, or where no *ac etiam* clause is inserted in the writ, any number of defendants may be joined in one writ, and the plaintiff may, afterwards, declare against those brought into court, severally, or against some, omitting others. (a)

[* 539]

(a) *Knickerbacker v. Colver*, 8 *Cow. Rep.* 111. *Roosevelt v. Soulden*, 16 *Johns.* 44.

NEW-YORK,
Nov. 1808.

JACKSON
v.
VIRGIL

Allington v. Valvasor, (1 Com. Rep. 74.) where four defendants were arrested on the *latitat*, and appeared severally, Ch. J. Holt held, that the plaintiff might declare against them severally.

Per Curiam. Where the process is not bailable, or the cause of action is not specified in the writ, the plaintiff may join any number of defendants in the writ, and declare against them severally. There can be no inconvenience in this practice. If either of the defendants is not declared against, and he wishes to get rid of the action, he must proceed by obtaining a rule against the plaintiff to declare against him, or be nonsuited.

Rule refused.

[* 540]

*JACKSON, *ex dem.* KENYON, *against* VIRGIL.

If an affidavit begins with the deponent's name, without being subscribed, it is sufficient

HOPKINS moved for an attachment against the defendant, for the non-payment of costs. The affidavit, on which the motion was founded, was not signed with the name of the party, but it was in the usual form, and had the *jurat* of a proper magistrate.

Per Curiam. As the affidavit begins with the name of the party making it, and appears to have been duly sworn to before a proper magistrate, we think it sufficient. (3 *Caines*, 190. *Haff v. Spicer and Potter.*)

Rule granted.

NEW-YORK,
Nov. 1808.JACKSON
v.
MEYERS.REYNOLDS *against* LAMMOND.

SEDGWICK moved to set aside the *capias ad satisfaciendum* issued against the defendant in this cause, for irregularity. The defendant had obtained a judgment before a justice, against the present plaintiff for 11 dollars, on which a *certiorari* was brought to this court, and at the last term, the judgment below was reversed, and a judgment of reversal in this court was entered, and on which the costs amounted to above 20 dollars. On the 26th July last, the defendant enlisted as a soldier in the army of the *United States*. It was contended, that the judgment of the costs on the reversal being subsequent to his enlistment, no execution could issue against the defendant.

Foot, contra.

Per Curiam. The costs must be considered as referring back to the original judgment, and that being prior to the enlistment, and the sum above 20 dollars, the defendant is not entitled to a discharge. (See *ante*, p. 445.)

Rule refused.

Where a person obtained a judgment before a justice, for 11 dollars, and enlisted as a soldier in the army of the *United States*, and the judgment was afterwards reversed in this court, with costs, amounting to more than 20 dollars, it was held, that the costs referred back to the time of the original judgment, and that the defendant in error was not entitled to be discharged from an execution issued on the judgment of reversal.

*JACKSON, *ex dem.* LUDLOW, *against* MEYERS.

[* 541]

I. TALLMADGE, for the defendant, moved for judgment in case of nonsuit, for not proceeding to trial at the last circuit in *Dutchess*, on the usual affidavit.

J. Radcliff, *contra*, said he was ready to stipulate, but supposed that, as the cause had been once tried, and a new trial granted, the plaintiff was not now obliged to stipulate.

Per Curiam. It makes no difference whether there has been one trial or not. In every case where the plaintiff does not bring on the cause pursuant to notice, he must be nonsuited, unless he *stipulates* to try the cause at the next circuit, or be nonsuited.

Where a new trial has been granted, and the plaintiff does not bring on the cause to trial, pursuant to notice, judgment of nonsuit will be granted, unless he *stipulates* to try the cause at the next circuit.

NEW-YORK,
Nov. 1808.

MAIN
v.
NEWSON.

FALLS *against* STICKNEY.

Where a plea is put in, which the plaintiff considers as frivolous, or a nullity, he may either enter a default for want of a plea, or demur, but must not apply to the court for judgment by default. (a)

GRIFFEN, for the plaintiff, moved for judgment by default, in this cause, on the ground, that the plea which had been put in, was a nullity.

Foot, contra.

Per Curiam. The plea is clearly bad, but it may have been put in, *bona fide*. If a plea is bad or frivolous, the plaintiff ought either to demur to it, or treat it as a nullity, and enter a default, without any application to the court. Had the plaintiff demurred, the defendant might have obtained leave to amend. The present motion was unnecessary.

Rule refused.

(a) *Sharp v. Sharp*, 1 *Wend. Rep.* 14.

[* 542]


*MAIN *against* NEWSON.

In every case made for argument, the party who is to open the argument, must deliver to the court, and opposite counsel, the *points* he means to insist on.

BALDWIN, for the plaintiff, moved to bring on the argument of this cause, when *S. Jones, jun.*, for the defendant, called for the points which were to be insisted on, in the argument. *Baldwin* replied, that the case came before the court on a point reserved at the trial, and it did not, therefore, come within the rule of practice requiring the party bringing on the argument to furnish the court and opposite party with the points.

Per Curiam. The rule is general, and the party must deliver the points in every case, before the argument comes on. Though a single question was reserved by the judge at *N. P.* yet that may give rise to various and distinct points of argument.

Rule refused.

NEW-YORK,
Nov. 1808.


GENERAL RULE.

November 21, 1808.

ORDERED, that hereafter, a plaintiff in any cause, at any circuit court or sittings, may, at the opening of the court, on each day, or on such day as the presiding judge shall allow, and before the court shall proceed to try any litigated cause, take an inquest: *provided*, the intention of the plaintiff to take an inquest shall be expressed in the notice of trial: and unless (before a jury are empannelled to take the inquest) the party defendant, or his attorney, shall file with the clerk of the circuit or sittings, an affidavit, satisfactory to the judge presiding at the circuit or sittings, that such defendant has a good and substantial defence, and serve a copy thereof on the opposite party, the defendant shall be held liable to pay the costs of the trial, provided the inquest is afterwards set aside, together with the costs of the application.

CASES
 ARGUED AND DETERMINED
 IN THE
Court for the Trial of Impeachments
 AND
THE CORRECTION OF ERRORS
 OF THE
STATE OF NEW-YORK,
 FEBRUARY AND MARCH, 1808.

DAVID DEAS, *appellant,*
against
DANIEL THORNE, WILLIAM THORNE, RICHARD V. W.
THORNE, JOHN THORNE, jun. and HENRY G. WIS-
NER, who are impleaded with the PRESIDENT AND
DIRECTORS OF THE MARINE INSURANCE COMPANY
OF NEW-YORK, *respondents.*

On an appeal
from an order
of the Court of

[* 544]

Chancery, post-
poning the hear-
ing of a cause,
until the assign-
ees of two of
the parties, who
became in-
solvent, pend-
ing the suit,
should be made
parties, this

court will not hear or decide on the merits of the cause. On an appeal from an interlocutory order of the Court of Chancery, this court will not permit evidence to be read, which was not read in the court below, nor will they hear and decide on the merits, unless the merits have also been heard in the court below. Where a party in a cause in chancery becomes insolvent pending the suit, his assignees must be made parties before the cause can be heard.

ON the 5th *May*, 1806, the appellant filed a bill in the Court of Chancery against the respondents. From the nature of the appeal, and the decision of this court upon it, *it becomes unnecessary to state the pleadings, or the facts on which the merits of the cause rest.

The respondent *John Thorne*, jun. filed his separate answer to the bill, on the 6th *June*, 1806. *Richard V. W. Thorne* filed his separate answer on the 25th *June*, 1806. On the 6th *June*, 1806, *Daniel Thorne* and *William Thorne* filed their joint

and several answers; and *Henry W. Wisner* put in his separate answer on the same day.

To these answers, the appellant filed a general replication, on the 3d *July*, 1806.

On the 7th *August*, 1806, the *Marine Insurance Company* put in their answer, to which the appellant replied on the 3d *September*, 1806.

The respondents *R. V. W. Thorne* and *John Thorne, jun.* who were original and necessary parties to the bill, having become insolvent, obtained on the 8th *December*, 1806, their discharge under the insolvent act, having assigned all their estate, in pursuance of the act, to *John Thorne* the elder, and *William Thorne*, one of the respondents. In *April*, 1807, *John Thorne, jun.* and *R. V. W. Thorne*, presented a petition to the chancellor, stating, that since they had filed their answers to the bill of the appellant, they had obtained their discharge under the insolvent act, and prayed leave to file further answers to the said bill, and that they might have the benefit of their discharge, among other matters of defence, to the suit. The prayer of the petition being granted, they filed further and separate answers, on the 17th *June*, 1807, setting forth their discharges under the insolvent act, and praying the benefit of them in defence. Replications were put in to these answers.

In *September*, 1807, the cause was regularly set down for a hearing, before the chancellor, and a motion being made by the appellant's counsel for that purpose, the counsel for the respondents objected to the cause being heard, for the want of proper parties, insisting, that *William Thorne*, one of the assignees of *John Thorne, jun.* and **R. V. W. Thorne*, in his character of assignee, ought to be brought before the court, and that *John Thorne* the elder was also a necessary party. The hearing of the cause was, therefore, postponed; and in *December*, 1807, the chancellor decreed, that the assignees of *John Thorne, jun.* and *R. V. W. Thorne* were necessary parties, and ordered, that the hearing of the cause should be further postponed, until they were brought before the court as parties. From this order, an appeal was entered, on the 28th *December*, 1807, to this court.

The reasons for this order were thus assigned by his honor,

THE CHANCELLOR. The object of the bill was to recover against *Richard V. W. Thorne*, and *John Thorne, jun.* a sum of money due on two policies of insurance, amounting to about 4,000 dollars; which the appellant alleged were delivered to him by them, as security for debts due by them to him, amounting to 3,198 dollars and 30 cents, but which policies they afterwards got into their possession, and fraudulently assigned to *Daniel Thorne* and *William Thorne*. There were other allegations in the bill,

IN ERROR

ALBANY,
Feb. 1808.

DEAS
v.
THORNE and
others.

[* 545]

*IN ERROR.*ALBANY,
Feb. 1808.DEAS
V.
THORNE and
others.

which it is not necessary now to state. All the transactions between the respondents, to the prejudice of the appellant, were charged in the bill as fraudulent.

The appellant showed that the property, for which he claimed to be compensated, was transferred to him merely as security. A comparison of the original sums stated to have been due, with the indication of the value of the subjects transferred, from the appellant's own showing, warranted the inference, that the value of the property amounted to about the sums for which it was pledged; but part of the sums, it was alleged, had been paid.

If there should be a surplus, *Richard V. W. Thorne* and *John Thorne*, jun. would be entitled to it, and their assignees, representing their interests, had a right to come in, as parties to the account, and to repel the allegation of fraud.

[* 54. i]

*The assignment, under the insolvent law, vested the interest of the insolvent in his assignees, jointly. Having a joint interest, both ought to have been brought in as parties; and it is no answer to say, that one of them was already a party before the court, since he was brought in, in a different capacity, to litigate on grounds with which his interest, as an assignee, had no necessary or immediate connection. I was, therefore, of opinion, that the cause ought to stand over, for want of parties.

Baldwin, for the appellant, was then proceeding to argue the cause on its merits, (the whole of the pleadings and evidence being stated in the cases delivered to the court,) when the court desired, that a *preliminary* question might first be argued, whether, on such an appeal, this court would hear and decide on the merits of the cause.

Baldwin. In the case of *Johnson v. Stagg*, (2 *Johns. Rep.* 510.) there was an appeal from an interlocutory order of the chancellor, referring it to the *master* to ascertain the amount of principal and interest, due on a bond and mortgage, set forth in the bill, and directing him to report thereon; and this court, on the appeal, heard and decided on the merits. Every order of the court below, of whatever kind, may be appealed from, and if all the facts and merits in the cause are brought before this court, on the appeal, there is no reason why this court should not finally decide on them, without putting the parties to the trouble and expense of going back to the Court of Chancery to have the merits there discussed and decided, and again, perhaps, brought up here by an appeal.

† Since reported
in 1 *Johns.*
Cas. 436.

In the case of *Le Guen v. Gouverneur & Kemble*,† where there was an appeal from an order of the chancellor, directing an issue to be tried at law, this court heard and decided on the whole merits of the cause.

Riggs and Van Vechten, contra. This is a court of *appellate* jurisdiction, instituted to correct the errors of inferior courts. It has no original jurisdiction whatever; but the present appeal is an attempt to convert it into a *court of original jurisdiction. It would be absurd for this court to proceed to correct errors in the decision of the court below, when no decision had been made in that court. Such a decree would be *original*, not *corrective*; since it would be founded on evidence never read or considered in the court below. Parties have a constitutional right to have their causes decided on the merits, in the courts below, and to have any supposed errors in those decisions corrected by this court: But if the present mode of proceeding is to be sanctioned, they will be deprived of the benefit of the Court of Chancery.

Again, the statute (*Laws*, v. 1. p. 185. sect. 9.) limits the right of appeal from all interlocutory orders or decrees to 15 days; but parties have five years within which to appeal from a final decree. If the present attempt succeeds, this provision, as to the right of appeal from final decrees, will be rendered nugatory.

In the cases which have been cited, there was a full hearing of the cause, on the merits, and the chancellor ought to have pronounced a final decree; and this court did no more than the Court of Chancery ought to have done. So in every other case, where this court has decided on the merits, on an appeal from an interlocutory decree, it will be found, that the orders were made, after a full hearing on the merits in the court below. In the present case, none of the evidence taken in the cause was read, but the hearing was postponed, on a preliminary objection for the want of the proper parties. No evidence can be read here, which was not read in the court below. It is a universal principle, that on an appeal, the cause must be heard on the same evidence, that was read in the inferior court. (*Eden v. Bute*, 1 Bro. P. C. 465. 2d ed. 1 Vern. 443. *Prec. in Cha.* 295. 496.) This rule is observed, even, on the rehearing of a cause, on an appeal from the master of the rolls, before the chancellor, in *England*, though it is in the same court. The practice contended for by the appellants would be subversive of the course of judicial proceedings, established by the constitution and laws. The business of this court would be increased to such a degree, as to render it extremely inconvenient, if not impracticable, to despatch it.

**Per Curiam*. In the cases in which this court have decided on the merits, on appeals from interlocutory orders of the Court of Chancery, the whole merits had been discussed before the chancellor. The party has a right to have his cause heard

IN ERROR

ALBANY,
Feb. 1808.DEAS
v.
THORNE and
others.
[* 547]

[* 548]

IN ERROR.

ALBANY,
Feb. 1808.DEAS
v.
THORNE and
others.

on the merits, in that court, as well as here. In the case of *La Guen v. Gouverneur and Kemble*, the court went far enough; but there, the merits were discussed and deliberated on by the chancellor, before he awarded an issue. In the present case, there is an appeal from an order, directing the hearing of the cause to be postponed for want of proper parties. The evidence was not read, nor the merits examined before the court below. This court ought not to hear evidence which was not read before the chancellor; and if we were to pronounce a final decree on the merits, it would be going beyond all the precedents. Some of the exhibits in the cause were to be proved at the hearing before the chancellor; and those proofs cannot be received here. By such a course of proceeding, the Court of Chancery would be rendered nugatory; and this court, possessing only an *appellate* jurisdiction, would depart from its peculiar province of correcting the errors of that court, and assume an original jurisdiction. The party is not only entitled to the benefit of the opinion of the court below, on the merits of his cause; but this court ought to be in a situation to have the benefit of the reasons of the chancellor, which it is his duty, by the constitution, to state. The argument must, therefore, be confined to the question, as to the propriety of the order postponing the hearing, and directing the assignees of *R. V. W. Thorne* and *John Thorne, jun.* to be made parties.

Baldwin then contended, that the assignees of *R. W. W. Thorne* and *John Thorne, jun.* were not necessary parties. The bill charges *R. V. W. Thorne* and *John Thorne, jun.* with fraud; and though exonerated from their debts by the insolvent act, they are not discharged from the fraud. They were necessary parties; and if they are to remain before the court as proper parties, it cannot be necessary to have their assignees brought in as parties. No person need be made a party, against whom there can be no decree; and no decree can be made against the assignees, on the ground of fraud. A bankrupt need not be made a party to a suit against his assignees, because his interest is contingent. (3 *P. Wms.* 311.) If the policies were not pledged to the appellant, then the bill ought to have been dismissed. If they were pledged, it will be seen from the evidence, that it was for a sum greater than the amount of the policies, so that there would be no surplus, which the assignees could claim. Besides, if there should be a surplus, the person retaining it would be a trustee for the assignees, to the extent of the surplus; and there would be no occasion of making the *cestui que trusts* parties, who are also trustees for the creditors, and who, on the same principle, must also be made parties.

[* 549]

Riggs, contra. It is admitted, that *R. V. W. Thorne* and *John Thorne, jun.* were proper parties, and interested in the subject matter of litigation. If so, then their assignees, having succeeded to all their rights, must be also interested. The objection that the bill charges fraud, cannot avail. Courts of equity do not punish fraud. Proceedings in that court are purely of a civil nature. It can only award costs. In truth, the whole controversy relates to money transactions, and is a question of *debtor* and *creditor*. It has been said, that the whole fund has been pledged, and that there is no surplus which can come into the hands of the assignees: But this is anticipating the decision of the court on this fact, and the assignees ought to be made parties, for the purpose of enabling them to contest the account, and receive the surplus, if there should be any. They claim a right to the property, and that right cannot be decided, unless they are parties. It is as requisite that executors, administrators, assignees, trustees, and the legal representatives of parties should be brought before the court, as it was to bring the parties themselves. The assignees are the representatives of the creditors; *and when the legal representative is a party, it cannot be necessary to bring in the principal. Though *William Thorne* is already a party, yet he is not so, in the character of an assignee; and *John Thorne* the elder, the other assignee, is not a party; as the assignment is to them jointly, one cannot act without the other. It is a fundamental rule of practice, in the Court of Chancery, which it is always most anxious to observe, that all persons who may be affected by its decrees, should be made parties. (*Har. Ch. P. 32. Mit. Plead. 58. 3 P. Wms. 333.*)

IN ERROR

ALBANY,
Feb. 1808.

DEAS

v.

THORNE and
others.

[* 550

VAN NESS, J. The decision of the preliminary question which was raised in this cause, leaves but a single point to be disposed of now, and that is, whether the chancellor was correct in suspending the proceedings before him, until the assignees of *R. V. W. Thorne* and *John Thorne, jun.* were made parties to the suit.

The subject matter of the controversy relates to certain policies of insurance, of which *R. V. W. Thorne* and *John Thorne, jun.* were once the indisputable and acknowledged owners. These policies are now claimed by the appellant, on the one hand, and by the respondents *Daniel Thorne* and *William Thorne*, on the other; each founding their claim upon an assignment, alleged to have been made to them by *R. V. W. Thorne* and *John Thorne, jun.* The rights originally involved in this cause, therefore, were, 1st. Those of the insolvents, *R. V. W. Thorne* and *John Thorne, jun.* 2d. Of the appellant, and 3d. Of the respondents *Daniel Thorne*

IN ERROR.

ALBANY,
Feb. 1808.DEAS
v.
THORN and
others.

[* 551]

and *William Thorne*. The other parties to the suit, for the purposes of the present inquiry, need not be noticed.

That the insolvents were necessary and proper parties to the suit, in the first instance, is admitted on all hands. The counsel for the appellant proceeded under that impression, by actually making them parties. Their rights, in the progress of the cause, were necessarily the subject of investigation; and until it was ascertained that they had legally divested themselves of their interest in the policies, the respective claims thereto of the appellant, and *of the respondents *Daniel* and *William Thorne*, could not be brought into view. The first question, therefore, arising for the decision of the chancellor; upon the final hearing, would be, whether the insolvents had made any assignment, or other transfer of the policies, at all. When *that* has been determined in the affirmative, then, and not till then, does it become material that the interest of the appellant, and *Daniel* and *William Thorne*, should be ascertained and determined. According, therefore, to the established rules of proceeding in the Court of Chancery, (*Mit.* 89—144.) the admission of the parties, and the reason of the thing, the insolvents were necessary and proper parties to the suit when it was first commenced.

Pending the suit, the insolvents obtained their discharge, under the act for giving relief in cases of insolvency; and the respondent *William Thorne*, and *John Thorne* the elder, were duly appointed their assignees. These facts the insolvents, by leave of the chancellor, disclosed in further separate answers, and prayed the benefit of them in their defence.

It appears to me, that every thing which has been said, to show that the insolvents were necessary and proper parties to the suit, before their discharge, applies, with equal force, to prove that the assignees, after that event, were equally so. They stand, in relation to this transaction, precisely in the place of the insolvents.

The assignees have succeeded to all the rights of the insolvents, which, in behalf of the creditors, they are bound to protect and defend. They have the same interest in the final issue of the cause, and, in the character of assignees, are entitled to be heard. They have a right to insist on the same defence which the insolvents had. Admitting that the policies in question have been assigned to the appellant, to secure the payment of the demands stated in the bill, still the amount actually due to him is in dispute. In this question the assignees, in behalf of the creditors, are materially interested.

[* 552]

*One of the assignees is not a party to the suit at all, and the other is not a party in that character. In my opinion, the suit cannot proceed until both the assignees, *as* such, are brought into court; and this opinion is in conformity with the

established principles and practice of the Court of Chancery. *IN ERROR*
(*Mit.* 58—63. 1 *Har. Prac.* 9th ed. 92.)

ALBANY,
Feb. 18.8

DEAS
v.
THORNE and
others.

It was said, on the argument, that from the answers and proofs in the cause, it was evident that the insolvents had pledged the policies in question to the appellant, and *Daniel* and *William Thorpe*, for the payment of a greater sum than had been recovered upon them, and as the insolvents, therefore, could have no interest in the decision of the cause, so neither could their assignees. This argument proceeds upon a false basis. A fact is assumed, in this stage of the suit, which cannot be judicially recognized to be true, until the final hearing of the cause. Until then, every person whose interest may be affected by that fact, must be a party, so that he may, if he pleases, controvert it if false, or admit it if true. The question here is, Who is entitled to receive the sum due upon the policies? Before that question can, or ought to be decided, surely every one interested in it ought to be heard. If the assignees are made parties, it is possible (though I admit, as the evidence *now* stands, it is very improbable) that they may be deemed to have a right to receive it.

For these reasons, my opinion is, that the appeal ought to be dismissed with costs, and that the order of the Court of Chancery ought to be affirmed.

This being the unanimous opinion of the court, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the order of the Court of Chancery complained of by the appellant, be affirmed; and that the appellant pay to the respondents 100 dollars, for their costs and expenses, on the appeal; and that the record and proceedings be remitted, &c.

Judgment of affirmance.

IN ERROR.

ALBANY,
Feb. 1808.
HARTSHORNE
v.
SLEGHT.

*LEWIS FARQUHARSON and others, *appellants*,
against
JACOB MABEE and others, *respondents*.

No costs are allowed the appellant, in this court, on a reversal of a decree of the court below. (a)

THE respondents, in their answer to the petition of appeal in this cause, consented that the orders of the Court of Chancery, complained of by the appellant, should be reversed, the plea and demurrer allowed, and the bill dismissed, with costs.

Hoffman, for the appellant, thereupon moved, that the respondents should be ordered to pay a sum to the appellants, to indemnify them for the costs and expenses attending the appeal.

Per Curiam: In the case of *Le Guen v. Gouverneur & Kemble*, (1 *Johns. Cas.* 522.) the question of costs on appeals was much discussed, and it was settled, that no costs are to be allowed, on the reversal of a decree. The bill must be dismissed with the costs in the court below; and each party must pay his own costs in this court.

Motion denied.

(a) *Murray v. Blatchford*, 2 *Wend. Rep.* 221, and the cases cited by the chancellor in his opinion.

[* 554] *HARTSHORNE, RHINELANDER and others, *plaintiffs in error*,
against
JOHN SLEGHT and CORNELIUS SLEGHT, *defendants in error*.

Where a writ of error was brought on a bill of exceptions from the Supreme Court, and the cause was decided in favor of the plaintiffs in error, and a *venire de novo* awarded, and on the new trial of the cause below, a second bill of exceptions was taken on the same point, and a second writ of error brought, this court, on motion, quashed the second writ of error. (a)

(a) *Pinney v. Gleason*, 9 *Cow. Rep.* 635.

gave his opinion, that the paper in question was a *sea-letter*, agreeably to the decision of this court, when the cause came before them, on a former writ of error. To this opinion, the counsel for the plaintiffs in error tendered a bill of exceptions. It was objected, that after this question had been definitively settled in the Court for the Correction of Errors, another bill of exceptions would not lie; but the *chief justice*, after some consideration, signed it; and on the bill of exceptions, a second writ of error was brought to this court. From the transcript of the record sent up, it appeared that the second bill of exceptions was precisely similar to the one on which the former writ of error was brought. Errors had been assigned, but there was no joinder in error.

IN ERROR.
ALBANY,
Feb. 1808.
HARTSHORNE
v.
SLEIGHT

Huffman, for the defendants in error, now moved to quash the writ of error, on the ground that a second writ of error would not lie for the same cause. (2 *Bac. Abr.* 477. *Error, G. note, 2 Sellon*, 540.) To show that this was the proper court, in which the writ was to be quashed, and not in the Supreme Court, he cited *Doug.* 336. 2 *Sellon*, 538.

Pendleton and *Harison*, contra. A court, whose decisions may be revised by a higher tribunal, will not, by quashing a writ of error, deprive the higher tribunal of the power of reviewing a decree, on an appeal. An appeal lies from the decision or decree of the highest court of law or equity, in any state, to the Supreme Court of the *United States*, in the cases mentioned in the 25th section *of the judiciary act; (*Laws U. S. v. 1. p. 47.*) and as this case draws into question the construction of a treaty of the *United States*, the plaintiffs in error have a right to appeal from the final decision of this court. The former decision in this court was not a final decree; no final judgment could be pronounced on the record then before the court; it was necessary to award a *venire de novo*. No writ of error lies but on a final judgment or decree. (6 *East*, 333.) Suppose a writ of error brought from the Court of Common Pleas to the Supreme Court, after a *venire de novo* had been awarded, could the Supreme Court, by quashing the second writ of error, deprive the party of the opportunity of bringing his cause to this court?

[* 555]

A writ of error is sometimes quashed for informality or irregularity; but it is a novel attempt to quash the present writ, because the law has been settled. It is objected, that a second writ cannot be brought on the same question; but how is this court to know that there are not other points involved, and to be decided, on the second bill of exceptions? A second writ of error may be brought where the first has been abated or discontinued, or in case of a voluntary nonsuit, though it may

IN ERROR.

ALBANY,
Feb. 1808.HARTSHORNE
v.
SLEIGHT.

not be a *supersedeas*. On the new trial, the plaintiffs in error might go into any matter of defence that they thought proper. The judge, at the sittings, could not refuse to sign the bill of exceptions tendered to him. The act is imperative. (*Laws N. Y.* v. 1. p. 276. sect. 6.) There has not been a final decree in this court; and it is enough, that the plaintiffs in error have, *prima facie*, a right of appeal to the Supreme Court of the *United States*.

T. A. Emmet, in reply. The motion is novel, because it is without precedent, that where a question has been settled by a court of *dernier resort*, the cause can be again brought before the same court for a second decision. If a party becomes nonsuited, on a writ of error, he cannot have a second writ of error. It is only in case of accident or inadvertence, that a second writ is allowed. This is, in fact, a writ of error to this court, to review its former decision. If the plaintiffs in error wished to *carry the cause to the Supreme Court of the *United States*, they ought to have appealed from the decision on the first bill of exceptions.

[* 556]

THE CHANCELLOR. (After stating the facts and proceedings in the cause.) The parties have changed situations. The plaintiffs in the court below having, on the former bill of exceptions, maintained the errors stated in their general assignment of errors in this court, the defendants below have now brought their writ of error. On this, they have made a special assignment of errors; that by certain treaties of the *United States* with the *French* nation, the *Dutch* nation, and the *Spanish* nation, respectively made, (which nations were, on the 13th day of *October*, 1798, and before and after, at open war, and with all which nations the *United States* were at peace,) in case either of the contracting parties should be engaged in a war, the ships and vessels belonging to the other party should be furnished with *sea-letters*, or passports, according to the form annexed to the said treaties respectively; one of which *sea-letters* was to be delivered to every vessel belonging to a citizen or citizens of the *United States*, by the direction of the executive government, as is set forth and specified in the record and proceedings in the cause: and the defendants, now plaintiffs in error, did specially, and in due form of law, set up and claim, as a right founded on the true construction of the said treaties, that the defendant in error ought to prove that the said vessel had sailed with such *sea-letter*, and that, not having so sailed, they were not entitled to recover on the said policy, which claim the chief justice had disallowed on the trial. A general assignment of errors was added, but no joinder in error has been filed.

A motion has now been made to quash the second writ of error, because the bill of exceptions presents the same point which has been already determined, as the error relied on.

The writ of error is a writ of right, and issues, of course, at the instance of the party conforming to the statutory restraint, which requires the certificate of counsel as a prerequisite *to its issuing. If, however, this legal right is wrested to the purposes of vexation or oppression, I have no doubt, but that it may be met in a summary way, by quashing the writ; nor is it contended, that if a proper case presents itself, it may not be done, in this stage of the suit, and in this court.

There are several cases on the subject of quashing writs of error, for variance between the writs and the records. So in the case of the former writ being *nonprossed*, which is an evidence that the second is brought for vexation or delay. But in ordinary cases, a writ of error operates as a *supersedeas*, and the rule that a second writ of error in the same suit shall not so operate, shows that the loss of the one is not always a bar to bringing another. (*Law of Errors*, 116. 1 *Vent.* 353. *Godb.* 66. 68.)

A case circumstanced like the present is not of frequent occurrence. It is settled, that in determining cases in error, a court of error must, upon reversal, if the plaintiff brings the writ, give the same judgment, which the court below ought to have given. (*Viner, Error*, D. b. 5. 1 *Salk.* 262.) Hence, when error is so apparent in the record, as to put it in the power of the Court of Errors to dispose of the cause definitively, the judgment is final. Here the cause came up originally on an exception to the opinion of the court below, which had excluded some of the evidence offered. That evidence having never been admitted, could not afford a basis for a final judgment, and it became, of course, necessary to render a judgment of an interlocutory nature, and to send the cause back to have the evidence that had been rejected introduced.

This court were of opinion, that the evidence which the court below had rejected, was proper, and gave the judgment which the court below ought, in that case, to have given, by deciding, that the evidence was admissible; and for that purpose, ordered a *venire facias de novo*. That evidence has, accordingly, been admitted; and now the defendants in the court below have brought their writ of error, relying on the *treaty sea-letter*; and alleging, in the first place, that in admitting this evidence, without permitting them to prove, by *parol*, the general acceptance *and understanding on the subject, in the terms of the former exception, is manifest error, and relying on the general assignment, which may be sustained either in the exception, if well taken, or by some error apparent on the record.

IN ERROR

ALBANY,
Feb. 1808.HARTSHORNE
V.
SLEGHT.

[* 557]

[* 558]

IN ERROR.

ALBANY,
Feb. 1808.
HARTSHORNE
V.
SLEGHT.

Unless the court are prepared to say, contrary to the intimation which, it has been stated, they have sanctioned by their former judgment, that if "there were two instruments, one legalized by the treaty, and the other by statute of the same denomination," *parol* testimony cannot be admitted to explain; unless they will undertake to decide that there are no errors apparent in the record, which the plaintiff in error may rely on, for the reversal of the judgment, the doctrine contended for, that as one of the parties has had a judgment reversed, because there was an error in excluding the evidence which he offered, the other shall, for that reason, be precluded from showing that there are errors to his prejudice in any part of the proceedings, cannot be maintained.

This court have not decided that a certificate of ownership was a *sea-letter*. If they had done so, it would have been an extrajudicial opinion, on a point not in controversy between the parties, for a bill of exceptions is not to draw the whole matter into examination again; it is only for a single point, not appearing in the record, and on which the party must place his finger, and not wander at large into the record. (1 *Bac. Abr.* 527, 528.) But the court merely decided that there was error in pronouncing that it was *not* a *sea-letter*. This must, of course, be tested by its relation to the subject matter on which that opinion was expressed, and that was the exception taken on the trial.

On the trial, on the part of the plaintiff, in the court below, it was contended, that the treaty *sea-letter* was exclusively entitled to that appellation; and on the part of the defendants, that the certificate of ownership had received the denomination of *sea-letter* from general understanding, and not from the laws of the *United States*, and though, in the conclusion of the bill of exceptions, it is *also* stated, that the counsel for the plaintiffs requested the court to charge the jury, that the sailing with such certificate was a compliance with the warranty in the policy, yet that request, if not limited to the evidence offered, is decidedly at variance with the special matter of exception, and involves the absurdity of offering *parol* proof as an inducement to its admission, and, without any additional matter introduced, insisting upon its being admitted without such proof. From the mode of introducing it, I therefore think, nothing more is to be legally inferred than that it was a general claim, formally expressed, in all events, so as to cover the particular exceptions, and to prevent all doubt as to the extent of their application.

The judgment formerly pronounced in the cause, by this court, which, though an unusual departure from the ordinary simplicity of the judgments of the courts of common law, by declaring that the court below had erred in determining, tha

'the paper writing, offered by the plaintiffs in error, on the trial, was *not a sea-letter*," settled the precise point intended to be determined; for whatever might be the reasoning which led to it, that judgment expresses the collective opinion of the court, and must be the governing one; and the opinion which dictated that judgment, as to be deduced from the question submitted by the parties, on the bill of exceptions, to which it ought to be a legal response, is, that the paper rejected was such an one, as, from the latent ambiguity of the policy, became a proper subject of explanation by *parol*.

If the opinion had stood solely on the ground, that the certificate of ownership was a *sea-letter*, the legal effect would have been to affirm that both that and the treaty document were *sea-letters*; and if so, a vessel sailing with one or the other of them must be considered as complying with the stipulation, that she should sail with a *sea-letter*; no latent ambiguity could then exist, to become a proper subject of explanation by *parol* evidence.

*If this reasoning is correct, there can be no ground for quashing the writ, merely because the bringing it is vexatious.

As to the arguments which have been urged, relative to an ultimate decision in the Supreme Court of the *United States*, I think the path of duty is plain and unembarrassed. This court are to decide as if no revisionary tribunal existed. If it were capable of taking any measures to evade the exertion of a constitutional revision, those measures, where the power exists, would probably be defeated. This court would not tolerate to have its justice eluded by the tribunals whose judgments or decrees they are authorized to correct, and that justice would always be enforced, and made commensurate to its legitimate jurisdiction; and so, I trust, will be that of the Supreme Court of the *United States*.

I think, upon the whole, there is neither authority or principle to warrant this application, and that the motion ought to be denied, with costs for resisting it.

CLINTON, Senator. This cause, at the last session of this court, after a full discussion, and deliberate consideration, was determined in favor of the present defendants in error. At the new trial, the plaintiffs in error tendered a bill of exceptions to the opinion of the court, on the very point which had been solemnly settled here; and we are now called upon, a second time, to decide the same question. This mode of proceeding would appear to be intended merely for delay; but we are told that it is for the purpose of carrying the cause to the Supreme Court of the *United States*, in the route marked out by the judiciary act. By recurring to the *judiciary* act of the *United States*, it will be found, that this cause, as it relates merely to

IN ERROR

ALBANY,
Feb. 1808.HARTSHORNE
V.
SLEGHT.

[*560]

IN ERROR.

ALBANY,
Feb. 1808.

HARTSHORNE

v.

SLEIGHT.

[* 561]

the proper denomination of a certain instrument, and the intention of the contract between the parties, does not come within the jurisdiction of the Supreme Court of the *United States*. The former decision of this court did not controvert the validity of any treaty or statute of the *United States*; nor did it draw into question *the construction of any treaty or statute; nor did it decide against any title, right, privilege, or exemption specially set up, or claimed under any such treaty or statute. On the contrary, it admitted the obligatory force of the treaty, the legitimacy of the sea-letter mentioned in it, the application of that instrument, as recognized in the laws of the *United States*, to this case; and established a construction favorable to the party claiming the benefit of a statute.

But the plaintiffs in error, if they wished to have carried the cause to the Supreme Court of the *United States*, ought to have brought a writ of error, for that purpose, when the cause was determined by this court. That judgment was final, as to the points in controversy between the parties. The principle was settled, and the remitting of the cause to the Supreme Court was merely for the purpose of ascertaining the damages. When the act of Congress speaks of a final judgment, or decree, it is as distinguished from an interlocutory judgment or decree; and it intends the application of the law to the case, by the court of supreme jurisdiction, and in the *last resort*. If the plaintiffs in error have mistaken the time proper for bringing their writ of error to the Supreme Court of the *United States*, it is their own *laches*, and they ought not to be indulged now, to the great expense and delay of the opposite party.

But there is, in my mind, a decisive answer to all the considerations arising from an intention to carry this cause to the Supreme Court of the *United States*. A court ought to pronounce the law upon the merits of the case, without reference to other tribunals; and should act as if their judgment was to be final and conclusive. It ought neither to accelerate nor retard appeals from its decisions: if it has any leaning at all, in a case like the present, it ought to be against the plaintiffs in error. Although I do not subscribe to the maxim, that he is a good judge, who enlarges the jurisdiction of his court; yet I do not hesitate to say, that it is the duty of all courts, to guard against *encroachments upon their rights; and situated as the state courts are, in relation to those of the general government, and with volumes of experience before us, showing the subtle contrivances and fictions, by which some of the higher courts of *England* have drawn to themselves every object of controversy, I think that we ought not to go out of our way to sustain applications like the present.

But to return to the merits of the cause. The error assigned

has been recently decided upon. Shall parties, then, be permitted to multiply writs of error without end? Shall the weight of purse, not the weight of justice, preponderate in the scale of controversy?

Bills of exceptions were unknown to the common law. The statute authorizing them was intended to permit the party aggrieved to state his exception to the judge, with a view of having the opinion or decision reexamined in a higher tribunal. When this review has been taken, the object of the law is answered, and its intention fulfilled. The act does not go further. The application for a bill of exceptions ought, therefore, to have been overruled, as oppressive, vexatious, and not within the remedy contemplated by the statute. The cause is, however, before us, and it does not avail the plaintiffs in error to say, that courts may and ought to review their own decisions. This court will hardly admit that doctrine. A motion for a rehearing, after judgment, has never been made or sustained. When a cause has been once settled, when a decision has been pronounced here, the law is established, and no power can change it but the legislature. The rule becomes binding, not only upon all subordinate tribunals, but upon this court. That we ought not again to pronounce the law, but that we ought to dismiss the cause at once, without a hearing, appears to me to be the proper course. It would be trifling with the court to rehear it on its merits; and this is not even contended for, or desired, by the plaintiffs in error.

A writ of error must be quashed in the court where it is returnable. (*Doug.* 339.) The principal ground for *quashing is for informality; but other grounds are indicated, as the want of all or proper parties; and it is stated, (2 *Sellon*, 406.) that the court would not quash a writ of error on motion, though it appeared to have been brought twenty-nine years; because, if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the statute, admitting clearly that the writ would have been quashed, on the merits of the case, if there had been no exceptions in the statute. Quashing, or annulling a writ of error is, therefore, not confined to matters of form. The case before us is *sui generis*. A similar one is not to be found in the history of judicial determinations. The decision heretofore made in this case, so far as it establishes a general principle, is the law of the land. So far as it is confined exclusively to the parties, it is *the law of the case*, and can never be called in question, or examined in any court of this state. In quashing this writ, we declare it a nullity; we declare that it ought not to have been issued; and we declare, that after having deliberately considered, and solemnly adjudged the controversy before us, we will not permit a round of vexatious litigation, and an accumulation of unnecessary expense.

IN ERROR.

ALBANY
Feb. 1805.

HARTSHORNE

V.
SLEIGHT.

[* 563.]

IN ERROR.

I am, therefore, for quashing the writ, with costs.

ALBANY,
Feb. 1808.ROGERS
v.
CRUGER.

This being the opinion of the majority of the court, it was, thereupon, ORDERED and ADJUDGED, that the writ of error in this cause be quashed, (the same having improvidently issued,) with costs

Motion granted.

[* 564]

*WILLIAM ROGERS and ANN, his Wife, *appellants*
against
BERTRAM CRUGER and others, *respondents*.

Where, on a petition of appeal, the appellant omitted to state the reasons in the appeal, and the respondent answered the petition, it was held, that he was too late, afterwards, to object to any defects in the petition, in matters of form.

A MOTION having been made to bring this cause on to be heard, *Pendleton*, for the respondents, objected, that the petition of appeal was not in conformity to the rule of the court. By the *ninth* rule, it is ordered, that the petitions of appeal, instead of reciting the pleadings at large, shall only recite the decree, or such part of it as is appealed from, and shall set forth *the reasons* of such appeal, and refer to the pleadings and exhibits filed with the clerk. In the present case, the whole proceedings are set forth, but the *reasons* of the appeal are not stated. The appellants merely state, that they are advised that the decree and the subsequent orders are erroneous.

Again, *William Hayward* and his wife, though not mentioned in the petition, are made parties in the printed case delivered to the court.

Benson and *Harison*, contra. That all the proceedings are inserted in the petition, can be no reason for quashing the appeal, though it may affect the costs. Where a female defendant is married, her husband may be added without a bill of revivor. (*Wyatt*, 2. 4 *Vin.* 142. sect. 2. 2 *Eq. Cas. Abr.* 1. 1 *Ves.* 182. *Mitford*, 55, 56. 1 *Har. Ch. Pr.* 128.) The intermarriage of *Sarah Cruger* with *William Hayward* was stated by the respondents, in their petition for a rehearing. But the respondents have answered, and put the cause at issue in this court; and it has been set down for a hearing, by consent. It is, therefore, too late, now, to make this objection. Still, it is optional with the party to state his reasons, or not. The rule was intended for his benefit, and was never before urged as a ground for quashing the appeal. There are

numerous precedents, in this court, where the appellant, after setting forth the proceedings, merely states that they were erroneous, without specially assigning the reasons.

IN ERROR

ALBANY,
Feb. 1808.

ROGERS

v.

CRUGER.

[* 565]

**T. A. Emmet*, in reply, observed, that this was a motion to set aside the appeal, for irregularity; that this was a case of infants, who can waive no right, and might, in any stage of the cause, object to matters of form.

Per Curiam. The petition of appeal is in the nature of a declaration; and the respondents having answered, have thereby admitted the petition to be competent, and have waived objections to matters of mere form. The present objection should have been made on filing the petition, and before respondents had answered. The application is now too late. It is contrary to the course of practice in all courts, to allow objections to matters of form, after an issue is joined on merits of the cause.

The motion must be denied; and the argument of cause proceed on the merits of the appeal.

Motion denied.(a)

(a) The cause was, afterwards, argued on the merits of the appeal; and the report of the case will be found in the next volume.

IN ERROR.

ALBANY,
Feb. 1807.TRUSTEES OF
HUNTINGTON
v.
NICOLL.

*The Trustees of the Freeholders and Commonalty of the Town of Huntington, ISAIAH JARVIS, SILAS SMITH, JESSE WICKES, TIMOTHY CONKLIN, PHINEAS CARLL, JOHN OAKLEY, SAMUEL SKIDMORE, RICHARD CONKLIN, and NATHANIEL BIGGS, *appellants*,

against

WILLIAM NICOLL, an Infant, by SELAH STRONG and RICHARD UDALL, his Guardians, *respondent*.

No appeal lies from a temporary order of the Court of Chancery, awarding an injunction; and such an order having expired, the appeal was dismissed. On an appeal from an order granting an injunction to stay proceedings at law, this court will not hear and decide on the merits of the cause, if the

[* 567]

court below had not heard the cause on the merits, before the order. (2) Where a bill is filed in the Court of Chancery, for the purpose of preventing a multiplicity of suits at law, and to have the title tried and finally settled, by one suit, under the direction of the chancellor, it seems, that the bill will be sustained, though there had been but one or two trials at law. No appeal lies from an order of the Court of Chancery, for the examination of the *guardians* of the complainant, who was an infant, as witnesses for him; such examinations being always taken *de bene esse*, and saving all just exceptions, and if inadmissible, on account of the incompetency of the witnesses, may be suppressed at the hearing before the chancellor, or, if admitted, may then become the ground of appeal.

IN May, 1806, *Selah Strong* and *Richard Udall*, the general guardians of the person and estate of *Wm. Nicoll*, the respondent, an infant, of the age of seven years, appointed by the Court of Chancery, filed their bill in that court, against the appellants. From the pleadings in the cause, the following facts appeared.

On the 4th June, 1688, letters patent were issued by the governor of the province of *New-York*, to *William Nicoll*, an ancestor of the respondent, for "all those islands and small isles of sandy land, and marsh or meadow grounds, with the appurtenances, situate, lying and being on the south side of *Long Island*, between the inlet or gut commonly called *Huntington gut*, and the lands of the said *Wm. Nicoll*, at a certain river, called *Conetquant*, in the bay or sound, that is between the firm land of *Long Island* and the beach, together with all and singular, the lands, meadows, marshes, moors, water-ponds, hawking, hunting, fishing, fowling, and all the rights, profits, hereditaments and appurtenances, to the said islands and premises belonging, or in any wise appertaining." *Wm. Nicoll*, the patentee, took possession of the islands described in the letters patent, consisting of four islands, called *Fire Island*, *Captree Island*, *Oak Island* and *Grass Island*, the three last of which are the subject of controversy in this cause. The patentee, and his descendants, the ancestors of the respondent, were successively seised and possessed of the said islands, until the year 1799, when the father of the respondent died. Upon his death, the title to the islands vested in the respondent; and the guardians of the respondent, having been appointed in the same year, immediately took possession

(a) *Beach v. The Fulton Bank*, 2 *Wend. Rep.* 226, and the cases cited by *Marcy, J.*, p. 230, et seq

thereof, which they have ever since held. The inlet, or gut, described in the letters patent, as commonly called *Huntington gut*, was a passage of water through the beach, from the bay into the main ocean, situated *westerly* of all the said islands, at the time when the letters patent issued; but at present there is not, and for many years past has not been, any such gut or inlet, situated westerly of the islands. The freeholders and inhabitants of the town of *Huntington* have, at different times, entered upon the islands, and cut and carried away the grass and other products growing thereon. Lately, the trustees of the freeholders and commonalty of the town of *Huntington* have laid claim to *Coptree Island*, *Oak Island* and *Grass Island*, as belonging to that town; and have, under their claim of right, authorized others to enter upon those islands, and take the products thereof. The guardians of the respondent thereupon brought actions of trespass, in the Court of Common Pleas, in *Suffolk* county, against *Zebulon Smith*, *Isaiah Jarvis* and *Silas Smith*, who had entered upon those islands, under the authority of the trustees of the town of *Huntington*. Those actions were removed into the Supreme Court, and the respondent declared, by his guardians, in trespass *quare clausum fregit*, for entering upon, and cutting down the grass, sedge, &c., and committing other trespasses on the said islands; and the defendants justified their acts under the authority of the town of *Huntington*. One of the actions was tried at a circuit court, held in the county of *Suffolk*, in *September*, 1905; and after a trial of two days, and an investigation of the titles and claims of the respective parties, the jury found a verdict for the plaintiff, on which judgment was entered up. The other actions are still pending. *Jesse Wickes*, claiming a right or title to the islands in question, derived from the town of *Huntington*, instituted actions of trespass against *Peter Monfort* and *Elias Leek*, for supposed trespasses, committed by them on those islands, under the authority of the guardians of the respondent, and their defence in those actions depends on the respondent's title. The trustees of the town of *Huntington* still persist in their claim of right to the islands in question: And the respondent, in his bill, alleged, that the trustees not only declared their intention to persist in their claim, but encouraged others to enter upon the said islands, and to cut and carry away the grass, &c., in despite of the respondent's title, and which would oblige the respondent to abandon his right, or lead to such a multiplicity of actions, as would impoverish the respondent, and produce great personal animosities among the inhabitants of *Suffolk* county.

The respondent, in his bill, prayed, that his witnesses might be examined, and their testimony perpetuated, in order that

IN ERROR

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL

[* 563

IN ERROR.ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL.

[* 569]

the respondent's title might be established, on the ground of the verdict and judgment at law, or such other grounds as the court might direct, and he be quieted in the possession thereof; and that the trustees of *Huntington* might be restrained by a perpetual injunction, from entering on the islands, and that the suits at law, brought by *Jesse Wickes*, might be restrained, &c.

*The bill having been sworn to by the guardians of the respondent, application was made for an injunction to stay the proceedings at law, pursuant to the prayer of the bill. But the application was not then granted by the chancellor, who refused to award an injunction, until after the answers of all the defendants should come in.

The appellants are the trustees of the freeholders and commonalty of the town of *Huntington*, who are a body corporate. *Timothy Conklin*, *Phineas Carll*, *John Oakley*, *Samuel Skidmore*, *Richard Conklin* and *Nathaniel Biggs* were some of the incumbent trustees of the town, at the time when the bill was filed; and *Isiah Jarvis*, *Silas Smith* and *Jesse Wickes* were lessees and tenants of the islands in question, under the trustees of *Huntington*.

By their answers, the appellants admitted that the letters patent issued to *Wm. Nicoll*, in 1688, and alleged, that the islands described therein, are certain islands, called the *Fire Islands*; and expressly deny, that *Captree Island*, *Oak Island* and *Grass Island* are included in, or intended by, the said letters patent; that the ancestors of the respondent took possession of the *Fire Islands*, as the islands described and intended by the said letters patent; that those islands have been held and enjoyed by the ancestors of the respondent, and are now held by him, without any interruption or adverse claim; and they denied, that either *Wm. Nicoll*, the patentee, or any other ancestor of the respondent, ever took possession or had possession of *Captree Island*, *Oak Island* and *Grass Island*, or either of them, in any manner whatever. They also denied that the respondent, or any of his ancestors, ever had any right or title to those islands.

They also alleged, that the gut described in the said letters patent, as commonly called *Huntington gut*, is a large inlet of water, situated easterly of the islands in question; and that the *Fire Islands* lie directly between that gut and the lands of the respondent, at the river *called *Conetqunt*; and that the islands in question all lie on the westerly side of that gut.

They further stated, that on the 30th of *November*, 1666, letters patent were issued by the governor of the colony of *New-York*, to the town of *Huntington*, by which the governor granted, ratified and confirmed all the lands within the limits and bounds therein expressed, which limits and bounds are particularly set forth; and they insisted, that *Captree Island*, *Oak*

Island and *Grass Island* are included and comprehended within those limits, and that, thereby, those islands vested in the town of *Huntington*, as their property; and that the town of *Huntington*, thereupon, took possession of those islands, and enjoyed them as their own.

That on the 2d day of *August*, 1688, the governor of the colony of *New-York* issued other letters patent to the town of *Huntington*, in which the letters patent of the 30th *November*, 1666, are recited and confirmed; that in these letters patent, the limits and bounds of the town are described and established to be precisely as in the first letters patent; that the freeholders and inhabitants of the town were thereby incorporated by the name of the trustees of the freeholders and commonalty of the town of *Huntington*, and that all the ordinary powers and privileges of a corporation were granted to them; that thereby the title to *Captree Island*, *Oak Island* and *Grass Island*, which were thus comprehended in both letters patent, vested in the corporation, and has remained in them ever since; that on the 5th *October*, 1694, other letters patent were issued by the governor of the province of *New-York*, to the town of *Huntington*, by which the first letters patent are recited, and the bounds of the town are altered: And they alleged, that from the time of issuing the said several letters patent, the inhabitants of the town, and after the letters patent of the 2d *August*, 1688, the trustees of the town, and others under them, have constantly, until this time, occupied and enjoyed *Captree Island*, *Oak Island* and *Grass Island*, by entering thereon, at pleasure, by fishing *and fowling thereon, and particularly by cutting the grass growing thereon; such being the only acts of possession of which those islands are susceptible; that for the last twenty years the trustees of the town have had possession of the islands in question, by leasing them from year to year, and by receiving the rents; and that, during that period, the tenants of the town have enjoyed those islands and have taken the profits thereof; that from the time when the several letters patent were issued to the town, until about eighteen years ago, the possession and enjoyment of the islands in question, by the trustees and inhabitants of the town, were peaceable, uninterrupted and exclusive, and without any claim of adverse title; and that they are able to prove their possession for the last sixty years, by living witnesses; that the ancestors of the respondent all resided near the islands in question, and well knew that they were claimed and enjoyed by the town of *Huntington*, and that none of them ever claimed those islands until lately; but that, on the contrary, some of the ancestors of the complainant expressly disavowed and disclaimed any pretence of right or title to those islands; that, about eighteen years ago, one of the ancestors of the respondent first set up a claim to

IN ERROR.

ALBANY,
Feb 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL.

[* 571]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HINTINGTON
V.
NICOLL.

the islands in question; but that no suit was ever brought and prosecuted to effect, by any of the ancestors of the respondent, in support of such claim.

The answers of the appellants having been put in, the respondent moved, in September, 1806, that an injunction should issue according to the prayer of the bill. This motion was opposed, and, after argument, was refused by the chancellor. In April, 1807, an order was made, that the respondent might examine his witnesses in perpetuation of their testimony.

In the May term, 1807, of the Supreme Court, *Jesse Wickes* obtained an order of that court, for the trial of the action brought by him against *Elias Leek*, by a special jury, and that the special jury should have a view of the premises in question. The jury was accordingly struck, notice of trial was given, and preparations were made for the view; and for carrying the cause down to trial, at the next circuit court, to be held in the county of Suffolk, on the 30th June, 1807.

Immediately after the rule for a special jury and a view had been obtained, affidavits were made in the suit in chancery, on the part of the respondent, stating that the questions of title were the same in all the suits at law, and also that the trial of any one of the suits would be attended with great expense. Upon these affidavits, the chancellor was again moved, in May, 1807, on the part of the respondent, for an injunction to restrain the prosecution of the suits at law; and, in opposition, an affidavit was read, on the part of the appellant, stating, among other things, that many, and the principal number of the witnesses of the appellants, whose testimony was material to establish their title to the islands in question, were very aged and infirm, and not likely to live long, and that the testimony of those witnesses could not be supplied or obtained from any other source, if they should die before their examination.

On the 4th June, 1807, the chancellor granted an order, that an injunction should issue to restrain *Jesse Wickes* from proceeding to trial in any of the suits at law, at the Circuit Court then next to be held in the county of Suffolk; and the injunction was issued, and served accordingly.

From this order, the defendants below appealed to this court.

In May, 1807, another affidavit was made on the part of the respondent, stating, that the respondent was owner of a large and valuable real estate, more than sufficient to pay all the costs and expenses which might accrue in consequence of this suit, and that *Selah Strong* and *Richard Udall*, his guardians, were believed to be material witnesses for him in the suit.

Upon this affidavit, the respondent, in May, 1807, applied to the chancellor for an order, that the guardians of the respondent might be examined as witnesses for him in this suit.

This motion was opposed: and it appeared from an affidavit,

on the part of the appellants, that before the commencement of this suit, five several suits at law had been instituted by the guardians of the respondent, one of which had been determined, as before stated; that the other four were still depending in the Supreme Court; that two other suits were depending in the Supreme Court, brought by lessees of the town of *Huntington*, against persons who had acted under the authority of the respondent's guardians; that those suits were, in fact, defended by his guardians, and that, besides the costs of suit in all these actions, which were great, the other expenses were very considerable.

The chancellor, on the 3d June, 1807, granted an order, that the respondent should have leave to examine *Selah Strong* and *Richard Udall*, his guardians, as witnesses for him in this suit.

From this order, the defendants below appealed to this court.

The reasons for granting these orders were thus given by

THE CHANCELLOR. Upon a view of all the circumstances of the case, I could not discover that the trial intended could definitively determine any point in controversy between the parties, or that it could tend to establish a right in either. The trespass, which was the object of the suit, was avowedly trifling; and the whole subject was before me, the defendants having submitted to treat it as an equitable object of jurisdiction. There is some resemblance, as to the nature of the interests of the several contending parties, between this case and those which have generally induced a court of chancery to entertain a bill of peace; though there are some peculiarities, which make it essentially variant from a usual controversy respecting boundaries. But without determining how far these considerations ought to be carried generally, on the merits disclosed, and without intimating an opinion on those merits, I thought proper, on the ground that the cause was brought before me, and that a trial could not produce any beneficial result to either party, to award an injunction to restrain a trial at the ensuing circuit in *Suffolk*. An opportunity was also thus given to review the question, should the cause continue pending until another circuit in that county.

A motion was also made, on the part of the complainant, to examine his guardians, as witnesses for him.

To this, it was objected, that they were not competent.

1. Because they were parties to the record.
2. Because they were responsible for the costs.
3. Because they had evinced a spirit of litigation, by the improvident commencement of several suits.

The rules of evidence are, in general, the same in equity as
VOL. III.

IN ERROR.

ALBANY,
Feb. 1808.

TRUSTEES OF
HUNTINGTON
V.
NICOLL

[* 574]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

at law ; but the rigid forms of the courts of common law will not readily yield to the modifications which this court can adapt to the promotion of substantial justice.

It is every day's practice in chancery to disregard the nominal parties to a suit, and to test the competency of witnesses, by their real relation to the objects in controversy ; and the mere circumstance of being a party does not always, of itself, disqualify. Indeed, from the forms of the court, the guardians are not alleged to be parties. The complainant prosecuted solely. His guardians are merely introduced to show, that it is with their approbation and sanction, that he prosecutes for the rights he claims.

It is certain, that *guardians*, as such, have no personal or immediate interest, in claiming the object of controversy for their wards. They are, from the trust confided to them, required to perform every beneficial act, in promotion of the interests of their wards. They are responsible, as trustees are who have no interest coupled with their trust, for its abuse ; and the improvident prosecution of unsuccessful suits may be deemed, under certain circumstances, such an abuse. But though they may eventually be liable for the costs accrued in such suits, in an *account with their ward, I think they would not be so to the defendants, unless the property of the ward should prove incompetent to satisfy them. In this case, it was shown, that there was property abundant to respond.

* 575]

Some strict principles have, perhaps, attached to this subject, from the doctrine of former ages, when the ward composed a species of property of his feudal guardian ; when beneficial rights were vested in the guardian, as connected with the wardship, and when every step promotive of the interest of the ward, yielded some advantage to the guardian ; but I can discover no other possible interest that a guardian can now have, but that derived from his liability to costs ; and as there are no express authorities to prevent a determination on general principles, the decision of the two first points must, in a great measure, be governed by those general principles.

The case of an executor at law, which was urged, as bearing a strong analogy to the present case, appeared to me to be very different. A defendant executor is made a party to the judgment, in the first instance, by the *si non* clause : His own particular interests are never brought into view, as distinguished from others beneficially interested in the testator's effects, where he prosecutes or defends in case of a debt or duty claimed by, or against him, as executor. He appears in the record to be, and in legal contemplation is, the absolute owner of the personal interests of the testator.

In the case of *Man v. Ward*, (2 Atk. 228.) Lord Hardwick
442

lays it down, that a nominal trustee, who has no legal interest *IN ERROR*
in the estate, may be examined in equity.

A guardian is not different, in point of interest, from such a trustee. Both represent the interests of others; both are answerable to those whose interests they represent, for an abuse of their trusts; the trustees, in many cases, primarily; the guardian more remotely and contingently; but the occurrence of the contingency supposes *laches*, or fault, which, in legal intendment, is not, *prima facie*, supposed to exist.

*From these considerations, I was of opinion, that neither [* 576]
the first nor second objection were well taken.

The third objection required an investigation far beyond what appeared to me a proper limit on the occasion. It would have been necessary to have been possessed of the whole ground of controversy, to have enabled me to pronounce definitively on the expediency of bringing the suit in question.

A repetition of the violation of the supposed rights of their ward, might impose on the guardians the duty of prosecutions. The number of suits was an evidence of the persevering disposition of both parties; but afforded no indisputable criterion from which a correct judgment could be formed.

I was, therefore, on the whole, of opinion, that the guardians might be examined, saving all just exceptions.

Sanford, for the appellants. 1. The bill of the respondent had two objects in view, to perpetuate testimony, and to establish a title. If it had been confined to the first object, there could have been no objection; but he has attempted to establish a *legal* title in a court of chancery. An injunction is auxiliary to the relief sought by the bill; and if no relief ought to be granted, then no injunction ought to issue. It will be said, that this injunction was limited and temporary, and that no appeal will lie from a temporary order; but the statute, (*Laws N. Y. v. 1. p. 185. sect. 8.*) gives to all persons aggrieved by any sentence, judgment, decree, or order of the Court of Chancery, or Court of Probates, a right to appeal from the same, or any part thereof, to this court. Though the order was temporary; yet if it was wrong, and the party felt himself aggrieved by it, he had a right of appeal, which cannot be taken away; he has a right to have the question, as to the propriety of such an order, heard and determined by this court. If the appeal be not allowed, the chancellor may, by granting temporary injunctions, from time to time, prevent the proceedings at law, and leave the appellants without remedy. The controversy between the parties is purely **legal*, founded wholly on a question, as to the legal title to certain lands. But we shall be told, that the bill of the respondent is a *bill of peace*. But bills of peace are filed where the controversy, in
443

ALBANY,
Feb. 1808.
TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 577]

IN ERROR.

ALBANY,
Feb. 1806.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

its origin, possessed some ingredient of equitable jurisdiction, as fraud or accident. The case of *Leighton v. Leighton* (1 *P. Wms.* 671. 4 *Bro. P. C.* 2d ed. 379.) was of this nature. Another set of cases is, where, though the question be merely legal, yet in order to prevent useless and endless litigation, a court of equity will grant a perpetual injunction, after repeated and successive trials at law. (1 *Mod.* 10. 4 *Bro. P. C.* 373.) I find, however, no case, in which the Court of Chancery in *England* has interposed, that there had not been; at least, five ejectments, or trials at law. (2 *Bac. Abr. Eject.* I.) There is no instance where an injunction has been allowed after a single trial at law. In *Barefoot v. Fry*, (*Bunbury*, 156.) there had been five actions of ejectment, and two bills in equity.

A third class of cases, in which bills, in the nature of bills of peace, are allowed, are those where a person claims a right against a great number of individuals claiming under the same general right, and the Court of Chancery interferes, to prevent a multiplicity of suits, by obliging the party to abide by the event of a single issue. Where the controversy is between two persons, no such bill has been allowed. (2 *Atk.* 483. *Mit. Plead.* 127, 128. 1 *Har. Ch. P.* 104—106.) It can make no difference that the appellants are a corporation. They make, in law, but one person. A bill will not lie to have an issue to ascertain the boundaries between two parishes (1 *Bro. C. C.* 40. 2 *Anstr.* 389.)

In the case of *Welby v. The Duke of Rutland*, (2 *Bro. P. C.* 39.) it was decided, that where a bill is brought to establish a legal title, and for a perpetual injunction, it is the established practice of courts of equity to dismiss the bill, though the defendant may have answered; and insisted on his title. This is a case in point, and the reasoning there stated is conclusive. But it may, perhaps, be said, that the appellants, by answering, admitted that it was a case properly within the cognizance of the Court of Chancery; *and that if they meant to object to the jurisdiction of that court, they ought to have demurred. Had the appellants demurred, they would have admitted the facts in the bill; they were compelled to answer, and ought not to be prejudiced thereby. It is a universal rule, that the want of jurisdiction may be urged in any stage of the cause. The admission of the parties cannot give jurisdiction, if the court has none. The defendant waives no right by answering; and he may make the objection, afterwards, as well as if he had demurred. (2 *Bro. P. C.* 39.) Where the complainant is not entitled to relief, the bill ought to be dismissed. (*Mitford*, 100.) Though an injunction may be granted when the bill is filed, yet, when the answer of the defendant comes in, and all the equity in the bill is denied, the injunction ought to be dissolved. Resting the case on the

[* 578]

bill and answer, therefore, no injunction ought to have issued; and it was granted, in this case, after the answer was filed.

The power of granting injunctions is discretionary, and ought not to be exercised in a doubtful case. For what purpose should the parties be put to the expense and delay of a suit in a court of chancery, when, after all, the rights of the parties must be tried by an issue at law? Their rights may as well be tried in the action of ejectment, already pending in the Supreme Court, as by an issue directed by the Court of Chancery.

The application of the respondent to perpetuate his testimony has been granted, and the evidence is preserved; but the appellants cannot perpetuate their testimony; for a bill for that purpose is never allowed, until the party who makes the application has prevailed at law. (2 *Atk.* 391.) Nor are the appellants aided by the late act, (30 sess. c. 130. *Laws*, v. 5, p. 147.) for it excepts the case where the adverse party is an *infant*. Aged and infirm witnesses, by a rule of the Supreme Court, may be examined, *de bene esse*, in a cause pending; but their testimony cannot be used in any other suit, so that the respondent has a decided advantage over the appellants, whose testimony may be lost, and the respondent is interested *to create delay for that purpose. Delay is victory to the respondent, but ruin to the appellants.

2. The second order directs the *guardians* of the respondent to be examined as witnesses. I contend that they are incompetent witnesses, and ought not to be examined. They are interested; and by a settled rule of the law of evidence are, therefore, incompetent. If the respondent fails in his suit, the guardians will be liable as trespassers; for they entered and took possession of the premises in question, and received the rents and profits. If they succeed, it will be for the benefit of their *ward*; but should they fail, they will be liable for the *mesne profits*. The *guardians* are in possession, and claim to hold as tenants under their *ward*; and it is a rule of law, that a tenant can never be a witness in support of the title of his landlord. (1 *Johns. Rep.* 159. 340. *Cowp.* 621. 1 *Str.* 632.)

Again, the guardians are personally liable for the costs of a suit at law, (2 *Sellon*, 67. 439. *Barnes*, 128. 1 *Str.* 548. 1 *Wils.* 130. 1 *Term*, 491. *Cro.* *Eliz.* 33.) and also in equity. (1 *Eq. Ca. Ab.* 72. *Proc. in Chq.* 376. 2 *Str.* 708. *Moseley*, 47. 86. 1 *Atk.* 570. 3 *Atk.* 401, 511. 547. *Mil. Pl.* 26. *Prac. Reg.* 349, 350. 1 *Hqr. Ch. Prac.* 309. 474. 2 *Eq. Cas. Abr.* 233. sect. 18.) That the ward may be possessed of a large estate does not remove the legal objection. The guardians are liable, in the first instance, and though they may, afterwards, be reimbursed, they are still incompetent. Bail, though indemnified by their principal, cannot be witnesses

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 579]

IN ERROR

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

for him. The affidavit, on which the order was founded states that the infant had real estate sufficient to pay all costs but that estate cannot be touched during his minority. Neither the guardians, nor any other persons, have a right to apply it towards the payment of costs. (1 *Vesey*, 461. 2 *Vesey*, 23.) It has been repeatedly decided, both in courts of law and equity, that a guardian was an incompetent witness, because liable to costs. (*Bac. Abr. Ev. B. Esp. N. P.* 704. 2 *Str.* 1026. *Cases temp. Hardw.* 302. 1 *Str.* 574. 1 *Atk.* 453. 2 *Atk.* 48. 228. 2 *Vesey*, 38. 41. 3 *Atk.* 511. 547.)

If a guardian, or *prochein amy*, be a necessary witness, the proper course of proceeding is to have his name struck out of the bill, and another person appointed. (*Harrison, C. P.* 475. 2 *Str.* 708.) Some cases in equity may be found, where mere trustees or nominal parties are allowed to be witnesses; but wherever the trust is coupled with an interest, a trustee, though not a party, is not admitted as a witness. (3 *Atk.* 95. 605. 3 *P. Wms.* 181.) Where a trustee is made a defendant, he has been allowed to be a witness, because *compelled by the complainant to be a defendant; and the complainant is not allowed to get rid of a witness, by making him a party. (*Har. Ch. Pr.* 285. 2 *Atk.* 228.) But there is no case, in which a plaintiff, or complainant, has been examined as a witness, for himself, or his co-plaintiff, or co-complainant. No man can be a witness in his own cause. (*Eq. Cas. Abr.* 225. *Gilb. Cas.* 98. *Prec. in Cha.* 411. 1 *P. Wms.* 195. 1 *Vernon*, 230. 1 *Har. Ch. Pr.* 389. 1 *Dick.* 382. 2 *Dick.* 350. 799.) The only exception is, where a complainant has been examined as a witness, on the application of the defendant, who might have obtained a discovery by a cross-bill. The guardians, in this case, as it regards the defendants, are the parties complaining. Further, the order for their examination is absolute. It ought to have been with a saving of all just exceptions.

* 580]

Riggs and *Benson*, for the respondent. The true question, before the court, relates to the propriety of the order for an injunction. The suggestion, that the bill is to be dismissed, in whole or in part, is, therefore, extraordinary. The bill of the respondents is in the nature of a *bill of peace*; its object is to have all the matters in litigation settled by one suit, in the Court of Chancery, and thereby to prevent a multiplication of suits in the courts of law. Another object is to perpetuate testimony, and to this is joined a prayer for relief.

The ground of the objection to the jurisdiction of the court is, that the controversy between the parties is purely a question of law, properly cognizable in the courts of common law, and that there is nothing to afford a ground for the inter-

position of a court of chancery. This objection might have been good on a *demurrer* to the bill; but if, instead of demurring, the party answers to the bill, and contests its merits, this court will support the jurisdiction of the Court of Chancery.

It was decided in the case of *Ludlow v. Simond*, (2 *Caines's Cases in Error*, 1. See the opinion of *Thompson, J.*, p. 40. and of *Kent, Ch. J.*, p. 51—56.) that where a defendant, instead of demurring to a bill, for want of matter of equity, answers to the merits, he thereby submits to the cognizance of the court, and equity ought to retain the cause, provided it is competent to grant relief, and has jurisdiction of the subject matter. *It will not be pretended, that the subject matter of this suit is not within the jurisdiction of either court. It is an established principle of a court of equity, that it will take cognizance of a cause, properly triable at common law, in order to prevent a multiplicity of suits. It is on this principle that bills of peace are sustained in that court. (1 *Vernon*, 22. 266. 2 *Vernon*, 301. 326. 1 *Atk.* 281. 2 *Atk.* 433, 484. 1 *Chan. Cas.* 272. *Gilb. For. Rom.* 195. *Mit.* 127, 128.) But it is said, that equity interferes only where there are a great number of persons on one side, claiming under a general right, and that here there is a corporation. But every member of that corporation may commit a trespass; for every corporator, according to the answer of the appellants, has a right to go on the islands, to cut grass, to fish, and to fowl, at his pleasure. If so, the litigation would be endless, as every such trespass would give rise to a suit.

Again, we contend, that this order is not such an one as can be appealed from, even if it were now in force. The 32d article of the constitution speaks of the judgments of the Supreme Court, and of the decrees of the Court of Chancery; and the statute organizing this court, (*Laws N. Y. v. 1. p. 182.*) declares, that if any person is aggrieved by any sentence, judgment, decree or order of the Court of Chancery, he may appeal. The constitution manifestly intended some judgment or decree, affecting the rights of the parties, not those orders, occasionally granted, in the progress of a cause, which do not, in the least, touch its merits. Though the word "order" is used in the statute, still it must mean such an order as will affect the merits of the cause. An order for an injunction is a mere preparatory or remedial process, and is no more the ground for an appeal, than an order for a *subpœna*, for a writ of *ne exeat* for taxing costs, for bringing money into court, or any other step, which may be requisite, in the ordinary course of proceedings. If the word "order" is to be taken in its most extensive and unlimited sense, then this court may sit to hear, decide upon and reform, every point of *practice* in the Court of Chancery. But it is a general principle, that one court never interferes in

IN ERROR

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 581]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL.

the practice of another. Each *court exclusively regulates its own practice. It certainly could not have been the intention of the framers of the constitution, or of the legislature, that this high court should sit to hear appeals from such orders.

Again, the order was *functus officio*; it had expired before the appeal was entered in this court. It would be strange, formally to reverse an order which did not exist. But considering it as an existing order, it was perfectly proper. It was not that a perpetual injunction should issue, or to hinder the appellants from receiving the rents and profits. It was to prevent useless litigation, and to save the respondent from heavy costs, in suits which could never put a final end to the controversy. The Court of Chancery is the peculiar guardian of infants, and will always protect their persons and rights. When, therefore, it was apparent, that the property of the respondent was to be wasted, in the expenses of endless lawsuits, it was proper for that court to interfere, and stay the suits at law, in order that the whole subject matter should be finally decided in one suit.

Next, as to the order of the 3d June, 1807. The guardians in case the suit should fail, will not be liable for the rents and profits: They can be liable for costs merely. They are not parties; they claim no right. The infant, *Nicoll*, is the party. The guardians may, or may not, be ordered to pay costs. They will not be liable to pay costs, unless they have acted improperly or wantonly. This is different from an action at law; there the costs follow, of course, on the judgment. In chancery, costs are always discretionary, and may be awarded or not, according to circumstances; according to the conscience, not according to the power, of the court. (*Gilb. For. Rom.* 205. 2 *Atk.* 551, 552. 3 *Atk.* 235.) In conscience, no guardian or trustee ought to pay costs, unless in case of gross negligence or misbehavior. If costs are awarded, they will be directed to be paid out of the estate of the infant, not by his guardian, personally. The objection is rather to the credit, than to the competency, of the witnesses. Though the guardians are nominal parties on the record, they may *be examined as witnesses. A co-defendant, when he has no interest in the subject matter of the cause, may be a witness. (1 *Johns. Rep.* 576, 577.) A guardian has been allowed to be examined as a witness in the *English* Court of Chancery. (*Wyatt's Prac. Reg.* 419. *Tothill's Rep.* 109. 2 *Dickens*, 781.)

[* 583]

Hoffman, in reply. 1. No order of the Court of Chancery can be made, from which the party aggrieved has not a right of appeal. All the errors of that court, and of the Supreme Court, are corrected here. It is said, that orders for injunctions are matters of practice; but rules of practice apply to all cases. The order for an injunction affects only the particular case. II 448.

the master grants an injunction, and the party against whom it is issued applies to the chancellor to dissolve it, and he refuses, it is his decision, from which an appeal may be entered. If a party has a legal right to damages in an action of trespass, and an injunction is issued to prevent his recovery, his right is affected; he is aggrieved, and ought to be allowed to appeal.

It is objected, that the merits of this cause have not been heard in the Court of Chancery; but they never can be examined in that court, since they exclusively belong to the cognizance of a court of law. It is on this ground that we contend that the bill ought to be dismissed, for want of equity. The chancellor, at any stage of a cause, may dismiss a bill, for want of equity; and what he can do, may be done by this court. Any person may file a bill in chancery, and call upon the defendant for an answer; but if, on examination, it contains no equity, it ought to be dismissed. This power of dismissing the bill, in any stage of the cause, is a salutary power; for why suffer the parties to proceed, through all the stages of a long and expensive litigation, when, at last, the bill must be dismissed, for want of equity?

The respondent, it is true, seeks also to perpetuate testimony; but it is for the very purpose of a trial at law. The whole bill ought, therefore, to be dismissed; but even if the respondent is entitled to this part of the *prayer, it ought to be dismissed, so far as it seeks relief. What ground of equity does the bill contain? It asks the interference of the Court of Chancery, to prevent a multiplicity of suits at law. After repeated trials in actions of ejectment, it is true, that perpetual injunctions are sometimes granted. Here, there has been but one trial at law. It may be, that at the first trial the merits were not fairly examined. New evidence may have been since discovered.

Again, another ground for a bill of peace is where there are a number of persons claiming distinct rights in the same subject, and where there must, necessarily, be a multiplicity of suits. The cases, however, are chiefly those concerning incorporeal hereditaments, or between a lord of a manor and his tenants, relative to distinct manorial rights. The present case is different. It is a suit by *Nicoll* against the corporation of *Huntington*, claiming in its corporate right. If every member of the corporation is to be considered as a distinct person, and to be separately sued, then it would be necessary that corporations should be always sued in a court of equity. A corporation may be sued as one person. If the respondent thinks proper to sue every corporator, the multiplicity of suits is his own choice. He might, by a single suit, in a *writ of right*, put an end to the controversy.

The respondent, having made his election to proceed at law,
Vol. III. 57 449

IN ERROR

ALBANY,
Feb. 1868.TRUSTEES OF
HUNTINGTON .
V.
NICOLL

[* 584]

IN ERROR.

ALBANY
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL

[*585]

ought not to be allowed to enjoin the appellants, until he has discontinued the suits he has brought, and paid the costs.

Again, it is important to the appellants, that the witnesses should be examined, *viva voce*, in open court, where the jury may have an opportunity of judging of the capacity, discernment and recollection of the witnesses, who are to testify concerning transactions long past.

2. The order for the examination of the guardians of the respondent, *Nicoll*, is certainly erroneous. Their names are on the record, and whether their interest be direct or contingent, they are equally incompetent. There *are stronger grounds for the objection, in the case of guardians, than in that of bail. Bail may be indemnified, or may surrender the principal, and be thereby discharged. If the guardians are personally liable for the costs, if the suit should fail, the objection on the ground of interest is insurmountable. They may, no doubt, be indemnified by the infant, but in the first instance, *they*, not the infant, must pay the costs. An *infant* is never ordered to pay costs in a court of chancery; (*Wyatt's Prac. Reg.* 145. 212. 222.) and in a settlement of accounts, between an infant and his guardians, it is a matter of discretion with the chancellor, to allow the costs paid by the guardians, or not. If the infant is not liable to pay the costs, the defendants must pay them, or they must be paid by the guardians. The guardians are, in truth, parties. They must swear to the bill, in order to obtain an injunction. So, if an infant answers by a guardian, he must be sworn. The answer of a guardian does not bind the infant, because it is not his answer. Guardians, then, are to be considered as parties. Trustees, who are not voluntary, but indispensable parties to a suit, are excused from costs; but guardians are not indispensable; the infant may sue by his next friend, who would, undoubtedly, be liable for costs. (*Wyatt*, 349, 350.)

Again, the guardians are co-plaintiffs with the infant; and a co-plaintiff is never examined as a witness, either in law, or in equity. The case of a co-defendant stands on a different ground, for they are not voluntary parties.

The case of *Walker and Thomas*, cited from *Dickens*, (2 *Dick.* 781.) was that of a guardian, *ad litem*, of a defendant. But those reports are the loose notes of a register of the court, and are not respected as high authority. See (1 *Scho. & Lefroy's Rep.* 240. *observations of* *Ld. Redesdale*.

In the case of *Beebe and others v. The Bank of New-York*, (1 *Johns. Rep.* 529.) *Olcott*, who was ordered to be examined as a witness, was a co-defendant, and a bankrupt against whom no relief was sought, his name being used merely as a matter of form.

*VAN NESS, J. This is an appeal from two interlocutory *IN ERROR* orders of the chancellor; the first, enjoining against proceeding at law, in certain suits in trespass, pending in the Supreme Court, and the second, authorizing the examination of *Selah Strong* and *Richard Udall*, the guardians of the respondent, as witnesses.

ALBANY,
Feb. 1808.
—
TRUSTEES OF
HUNTINGTON
V.
NICOLL.

To decide on the first ground of appeal, it is necessary preliminarily to examine, whether this is an order from which an appeal will lie.

The statute, regulating the proceedings in this court, gives the right of appeal from *any order* of the Court of Chancery. That *all* orders, however, made in the progress of a cause in that court, are the subjects of appeal, is a proposition to which I cannot assent. That there are some orders from which there is no appeal will, I think, not be denied. If it were practicable, it would be very desirable, by a decision of this court, on some proper occasion, to establish a rule on this subject, whereby the profession might, hereafter, be governed. In the present case, however, this is not required. The order under consideration was temporary in its terms. It merely suspended the proceedings at law, until after the then approaching circuit, to be held in the county of *Suffolk*; after that time, its operation ceased, and it was no longer a subsisting order. Although it had not expired, at the time the appeal was entered, it is now no longer in existence, and the question is, whether, from such an order, an appeal will lie.

The power of granting injunctions is confided to the discretion of the Court of Chancery, to be exercised in all cases, when that court shall deem it necessary, for the furtherance of justice. It is a very necessary, and, when exercised with wisdom, a highly beneficial power. In the Court of Chancery, as in other courts, it frequently happens, that interlocutory orders are made, without the advantage or opportunity of nice and critical examination. Temporary injunctions, therefore, are sometimes granted for the purpose of a more deliberate examination of the grounds *upon which the application is founded. They are also, sometimes, granted in doubtful cases. It will be recollected, that an injunction does not affect or conclude the merits of a cause. It merely stays the proceedings at law, until the merits are finally discussed and determined. In all cases, therefore, where an appeal is brought from an order of this description, this court should be well satisfied, that the order had been made clearly and palpably contrary to the equity of the case, and the rules and practice of the court.

These considerations have led my mind to the conclusion, that the present appeal ought not to be favored. The injunction has not operated to the injury of the appellants; for even admitting that they might have prevailed in the trials, which were enjoined, the amount of their recovery must have been

[* 587]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

trifling. But if we suppose, for a moment, that the chancellor committed an error in granting this temporary injunction, which has long since expired, what relief can we give the appellants? We cannot reverse the order, for that no longer exists. There is nothing upon which the judgment of reversal could operate. To pronounce a nugatory and idle judgment, which we have not the power to enforce, is incompatible with the solemnity and dignity of judicial proceedings. It has been said, however, that if there is no appeal from orders of this kind, that the chancellor may always elude an appeal, by modifying his orders, so as to suffer them to expire before a decision on the appeal can take place. This is an argument which this court will not listen to. We are not to presume, that a public officer will corruptly exercise the power with which he is invested for the public good; and much less ought we to found a decision upon odious and disreputable presumptions against the integrity of a judicial officer. A reasonable confidence in public officers is necessary to the very existence of civil government. I forbear any further remarks on this argument; and regret that it was thought necessary to urge it.

[* 588]

*All the relief that we could afford in this case, then, would be to declare that the chancellor ought not to grant another injunction; or, in other words, to pronounce a cautionary or advisory judgment. This would be as illegal and unprecedented, as it might prove unjust. The respondent might disclose new facts to the chancellor, upon which it would not only be expedient, but manifestly his duty, to enjoin new trials at law, and upon which, could they be exhibited to this court, in the first instance, we would ourselves grant an injunction.

I am, therefore, of opinion, that on this ground the appeal, as to the first order, ought to be dismissed.

On the argument of this cause, the question, whether the respondent had, in his bill, disclosed a case of which the Court of Chancery could take cognizance, was fully discussed; and it is, perhaps, expected, that this court will give an opinion upon that point. I shall proceed, therefore, to its examination.

In the first place, however, it is necessary to remark, that if this court should be of opinion, that the facts stated in the bill present a proper case for equitable interference, it follows, as a matter of course, that the proceedings at law must be enjoined. The latter is a necessary consequence of the former.

Before I consider the law, relating to this part of the subject, and for the better application of it to the case before us, a very brief statement of some of the facts is essential.

The respondent claims title to the premises in question, as part of the lands described in an ancient patent, granted to his ancestor; and it is admitted, that if this grant comprehend the premises, that the respondent has a perfect title thereto

The appellants deny, that this grant comprehends the premises, and insist, that the title is vested in the trustees of the freeholders and commonalty of the town of *Huntington*, under certain grants made to *them*, but which are posterior in date to that under which the respondent *claims. The premises in dispute are three islands, which, in the patent to the ancestor of the respondent, are described as situate in the bay or sound that is between *Long Island* and the beach. These islands are uninhabitable, and incapable of being cultivated; they are, therefore, unenclosed, and produce nothing but a species of wild grass, called sedge, which, for a long time, has been cut, at *certain seasons of the year*, by the inhabitants of the town of *Huntington*; and this is the chief, if not the only, use which has been or can be made of them. It is evident, from this statement of facts, that the premises in question are not in the *actual* possession of either of the parties, and that the legal possession is in the party having the right. The principal question, therefore, between the parties is, whether the grant to the ancestor of the respondent comprehends the premises. This is a question of fact.

I will now, as briefly as possible, examine the subject; and I think I shall be able to show, that under all the circumstances, this is a proper case for the interposition of the Court of Chancery.

Courts of law, in some cases, have not the power of putting an end to vexatious and oppressive litigation. Actions of ejectment, and in cases where the property is situated as these islands are, actions of trespass may be repeated again and again, until the sinews of litigation are exhausted, and until the resources, but not the spirit, of the parties fail. This is, perhaps, a defect in the common law system, which is supplied, in certain cases, by the more enlarged and superintending powers of a court of chancery.

In some cases, a party is permitted to establish his rights in a court of chancery, in the first instance, without having previously done so by trials at law. In others, it is necessary, first to establish his rights at law, before a court of chancery will interpose. In examining, with some attention, the cases cited on the argument, and other authorities, I am satisfied that the present case is within *the principle of several of them; though I admit, that there is no case which, in all its parts, is analogous to the present. But it is enough, if this comes within the reason of those cases, where equity has taken cognizance of the legal rights of parties, with a view of terminating endless and ruinous litigation. It is time that we should, for the purpose of rendering the administration of justice more perfect and complete, take the lead, instead of waiting for precedents, in order to follow them. Courts of equity, in *England*, have en-

IN ERROR

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL

[* 589]

[* 590]

IN ERROR.ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONV.
NICOLL.

tertaind causes, where the remedy at law is not clear, certain or adequate, or where the remedy was difficult. So they have entertained bills to prevent a multiplicity of suits, by directing the rights of the parties to be ascertained upon issues framed by the court, instead of obliging the plaintiff to sue a number of persons separately at law, where each suit would only determine the particular right in question, between the plaintiff and defendant, in that suit: Though, in such cases, equity will not interpose, when the right is disputed between two persons only, until it has been first tried and decided upon at law. But how many trials are necessary to be had, before the Court of Chancery will interfere, must depend upon the sound discretion of the court. This seems to me to be the fair deduction from all the cases on this subject.

In the instances where the Court of Chancery has taken cognizance of the mere legal rights of the parties, it has not assumed the authority to try and decide such rights. This has been uniformly and properly referred to the courts of law, where all the trials are had, where the titles of the parties are investigated, the proofs exhibited, and the witnesses examined. All the Court of Chancery does, is to decide how long the litigation at law shall continue. After a sufficient number of issues have been tried, satisfactorily to determine the right, an end is put, by a perpetual injunction, to further contest: And the party, having thus established his right at law, is quieted and protected in the enjoyment of it. I cannot but consider this as among the most beneficial and salutary powers of that court. *Courts of law are not equal to this purpose. Their mode of administering justice does not reach the evil; and it is for this reason, that the Court of Chancery is called to their aid.

[* 551]

In the case before us, what is the infant to do, in order to be quieted, admitting the right to be with him? It is said he may bring an ejectment. True, he may do so; but it will be seen, that the moment he resorts to that mode of investigating the right, he admits that he is out of possession. He has once prevailed, in an action of trespass, against a person who justified under the title of the town of *Huntington*; and in that suit, he must have shown himself to have been in possession, or he would have been nonsuited. Is it just, then, to force him to an action, in which he must abandon a very important advantage, which the party in possession always enjoys? But suppose he should bring an ejectment, and recover; will that settle the right and terminate litigation? By no means. A recovery in one action of ejectment is no bar to the bringing of another. The parties may proceed, as often as they please; and, very frequently, he who can longest bear the expenses of litigation will, in the end, prevail.

It has also been said, that the respondent may bring a writ of right. But by resorting to that remedy, he admits that he is disseised. There, as in the action of ejectment, he is obliged to yield an advantage, which ought not to be required of him. If he admits that he is disseised, (which, by bringing a writ of right, he undoubtedly does,) at what time is that disseisin to be deemed to have taken place? I cannot see why, according to his own admission, it is not to be carried back to the date of the patents to the town of *Huntington*. If so, he gives up his cause, because the statute of limitations would be a complete bar to his recovery.

But it is said, that the trial of the actions of trespass may settle the controversy. The answer to this is, that it may not have that effect; and, after all the suits now *pending between the parties have been tried, the controversy may be as far from being terminated, as it is at this moment. Unless some mode of putting an end to this controversy can be devised, after the right has been determined at law, the infant may as well abandon his claim at once. He is obliged to maintain an unequal contest. The appellants command the resources of the whole town of *Huntington*; but the infant must rely exclusively upon his own means. The expenses of a trial, it is stated, are not less than 500 dollars, and that in a suit in which, if he should be successful, he, probably, will recover only nominal damages.

There is another ground, on which I think the chancellor ought to entertain this bill; a ground clearly within some of the cases which have been cited. I am strongly inclined to think, that all the freeholders of the town of *Huntington* have a right to enter upon these islands, and cut the grass without the license of the trustees. The grant of 1694, is to certain persons therein named. These persons made a body corporate, and have perpetual succession. But in relation to the property in question, as well as the other property mentioned in the grant, the members of this corporation are, in their natural, not corporate capacity, mere naked trustees for the freeholders of the town, and may be compelled to execute this trust, by their *cestui que trusts*, at any time. I very much doubt whether, if the freeholders should enter upon the island, and cut the grass, the trustees could maintain an action of trespass against them.

The grant is to the trustees, to the use of the freeholders, as tenants in common. I do not see why the statute does not execute the use. If so, the freeholders of the town have the legal estate. But on this part of the case, I do not mean to express a decided opinion. It is sufficient for the purpose of giving the Court of Chancery jurisdiction of this case, that there is color for this construction of the grant.

*Should this construction of the grant, however, be correct,

IN ERROR.

ALBANY,
Feb. 1808.

TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 592]

[* 593]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

a case is presented to us, where the chancellor has an undoubted and acknowledged right to interfere. But suppose the legal estate to be in the corporation. A corporation, as such, is not liable to an action of trespass. The only use which can be made of this property, is to cut the grass and herbage growing upon it. This, as is stated in the bill, is cut by as many of the inhabitants of the town of *Huntington*, as have occasion for it, either with or without the consent of the trustees. Every one of these, if the right is in the respondent, is a trespasser; and a field is thus opened for endless, fruitless and ruinous litigation.

I am of opinion, therefore, that this is a case proper for the Court of Chancery, and that, under the superintendence of the chancellor, such trials at law ought to be awarded, as will be necessary to determine the right; and that being once done, that he should direct the controversy to end, by such a decree as may be necessary for that purpose.

2. The other order, from which there is an appeal, is that permitting the examination of the guardians as witnesses. The examination of witnesses in the Court of Chancery is always subject to just exceptions to their competency. If they are interested, the party against whom their testimony is to be used may object to their competency, when their testimony is offered; and although I am strongly inclined to the opinion, that the guardians are not competent witnesses, yet I think that the appeal, in this case, is premature. The testimony of the guardians may turn out not to be material; or the same facts may be proved by other witnesses, and the testimony of the guardians may never be offered or relied upon; and should it be relied upon, the question of their competency may always be urged against its admission.

I am of opinion, therefore, that the appeal, as to this order, ought also to be dismissed.

, • 594]

SPENCER, J. It cannot be necessary to repeat what has been said in other causes, as to the right of appeal from orders of the Court of Chancery. The right is given by statute, and when this appeal was interposed, the order was an existing one. An order for an injunction, after answer, necessarily implies, that in the opinion of the court, there is a case before it, presenting grounds on which it may eventually proceed to act; and it must be presumed, that the bill and answer have both been examined and considered. There being, then, a basis for the appeal, this court has become properly possessed of the cause; and though there would be an absurdity in annulling an order which has expired by its own limitation, yet, as the merits of the case have been considered, we are called upon to make

such a decree, as the justice of the case, and the propriety of preventing further litigation, may require.

With this view, and under these ideas, this court has, in various instances, proceeded to a final decree, where the appeal has been merely from an order for a feigned issue; but supposing the time prescribed for the trial had elapsed, when the appeal came on to be heard, it would be no objection to entertaining the appeal. In those cases, however, of orders for feigned issues, the Court of Chancery had given no opinion on the merits; but the merits had been brought into view, on the argument for an issue. In the present case, the merits of the bill and answer must have been the topic of argument, on the application for an injunction. This case, therefore, comes within the principles of those cases, and is different from that of *Deas v. Thorpe and others*, (*ante*, p. 543.) in which there not only had been no examination of the merits, but some exhibits were yet to be proved. I can conceive no difficulty or impropriety in examining the case, on its merits, with a view of ascertaining, whether the Court of Chancery had any cognizance of the cause, beyond perpetuating the testimony of the respondent's witnesses.

This leads me to inquire, in what cases a court of equity can take cognizance of a question, purely of a legal nature, and appertaining to the courts of common law, *under the notion, that the bill is a bill of peace, or in the nature of a bill of peace.

That this case involves matters of equity, as contradistinguished from strictly legal principles, has not been pretended. The multiplicity of suits, and the great expense attending their trial, together with the fact that the respondent has had one verdict, are the grounds relied on, to give the Court of Chancery jurisdiction of the cause.

It is of the utmost importance, that the lines of demarkation, between the courts of law and of equity, should not be confounded and violated. Hence it has grown into a maxim, that a court of equity has no jurisdiction, where the courts of common law are sufficient for the purposes of justice; and where a plaintiff can have as effectual and complete remedy in a court of law, as in a court of equity. To this maxim there are but few exceptions. Courts of equity take cognizance of questions, involving legal principles only, and which are triable in the common law courts, in order to put an end to oppression, and to prevent a multiplicity of suits, by way of a bill of peace. There are only two cases in which this is done.

The first is, where there have been repeated trials and a satisfactory determination at law, on the point of right; as in actions of ejectment and trespass, which, not being final, without

IN ERROR

ALBANY,
Feb. 1808.

TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 595]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL.

the interposition of a court of equity, there would be no end to the oppressiveness of litigation. (*Bro. P. C. 373.*)

The other case is, where one general legal right is claimed against several distinct persons, and where each suit would determine only the particular right in question, between the plaintiff and defendant, in that suit. (*2 Atkyns, 391. 483. 1 Bro. P. C. 40. 572. 6 Bro. P. C. 575.*)

The cases illustrative of the latter subject of equitable jurisdiction are, where a right of fishery is claimed by a corporation, throughout the course of a considerable river, and is opposed by the lords of manors and owners of land adjoining; and where there exists disputes between lords of manors and their tenants, and between the tenants of one manor and another.

[* 596]

*The respondent's case comes within neither of these principles: not within the first, because here has been but one trial and one verdict; and it would be unprecedented, to consider a single verdict in trespass, decisive of the right between the parties: not within the second exception, because the bill and answer admit that the trial which has passed, and those which are pending, involve the question of title to the islands; and the verdicts in which the individuals claim under the trustees and the respondents, are as operative upon them, as though the suits were between them and the trustees, and might, in the same manner, be given in evidence on future trials. There is no pretence for such a bill, as the present, where a right is in dispute between two persons only, (and this, in effect, is such a case,) until that right has been tried and decided upon, repeatedly and satisfactorily, at law. The respondent, then, in my opinion, has been premature in exhibiting his bill, and it ought to be dismissed. In coming to this conclusion, I am influenced by the wish to save expense, and to prevent a useless litigation in chancery, and, perhaps, a future appeal to this court.

I ought, perhaps, to notice a suggestion, that the property being uninhabitable, it is impossible for either party to bring an action of ejectment, or a writ of right. If this were conceded, it would prove nothing; for the trials in trespass as effectually try the title, as an ejectment, or any real action. But the proposition is not maintainable. The acts of cutting the grass and removing it are such acts of possession, as would warrant the making the persons exercising such acts defendants in ejectment.

It has been objected, that the appellants should have demurred to the relief, and that, by answering, they have submitted to the jurisdiction of the court, and are now too late to make such an objection. The case of *Welby v. The Duke of Rutland* (*6 Bro. P. C. 575.*) is a decisive answer to that objection; and it establishes, that where there is a want of equity

in the complainant's bill, an answer is no waiver of the objection. In that case, the bill was dismissed, on the *ground of a want of equity, notwithstanding the defendant had answered.

Mitford lays down the rule correctly; "for in general," he says, "if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hearing the cause." (*Mit. Pl.* 100.) So in the case of *Ludlow v. Simond*, both the *chief justice* and Mr. Justice *Thompson* limit the effect of answering, instead of demurring, to cases only where the subject matter is within the jurisdiction of the court.

I am inclined to the opinion, that the appeal from the order to examine the respondent's guardians as witnesses, is premature; for it does not follow, that those depositions would ever be used as evidence. Should they be so used, it would then be time to take the exception.

The result of my opinion is, that the Court of Chancery had no jurisdiction in this cause, beyond the perpetuating the testimony of witnesses, as this was not a case where the trials at law would not bear on the question of right between the appellants and respondent; and as there has not been such repeated trials, as reasonably to settle the question of title. Under these impressions, I think the bill should be dismissed, with the costs of the Court of Chancery, to be paid to the appellants.

KENT, Ch. J. This is an appeal from two interlocutory orders of the Court of Chancery; the one order of the 4th of June last, directing an injunction, to restrain *Jesse Wickes*, one of the appellants, from proceeding to trial, at the then next *Suffolk* circuit, in three several actions of trespass, pending in the Supreme Court; and the order of the 3d of June last, directing, that the respondent, *Nicoll*, have leave to examine his two guardians as witnesses.

1. The injunction order was special, and confined to the then ensuing Circuit Court in *Suffolk*. It has, therefore, long since spent itself; and a preliminary question very naturally occurs here, whether an appeal from such a temporary order can be sustained. An appeal from such an *order is without precedent, and it appears to me to be without sense or meaning. What use can there be in such an appeal? To reverse an order, which has long since expired, is absurd. It would be doing an idle act, which does not comport with the gravity of a court of justice. It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous. *Lex nil frustra facit. Lex non cogit ad vana seu inutilia.* An application of this rule lately occurred in the Supreme Court.

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.

NICOLL.

[* 597]

[* 598]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONV.
NICOLL.

In the case of *Teel v. Sweeting*, (2 Johns. Rep. 184.) a motion was made by the attorney general, for leave to file an information, in the nature of a *quo warranto*, against one of the supervisors of *Onondaga* county, who was alleged not to have been duly elected into office. But the court observed, that as the office of the supervisor would expire in *April*, and before the remedy prayed for could have effect, (for the motion was made in *February*,) it would be idle and useless to grant the motion, and it was, on that ground, refused. I cite this decision for no other purpose, than to show, that it has hitherto been considered as a settled principle, that a court will not undertake to exercise power, but when they exercise it to some purpose.

If we were to follow the suggestion of one of the appellants' counsel, and add to the decree of reversal, that they have liberty to proceed to trial, we should be granting nothing, for the appellants have that leave already. There is no existing order or injunction to restrain them. He undoubtedly intended, that our order should have the effect of declaring, that no future injunction was to be interposed. But I much question the propriety of such an exercise of power by this court. We are not a court of original jurisdiction. We have no right to regulate the court below, touching the future progress of a cause. We cannot make a mere advisory decree, as to future cases. Our province is to review and correct acts which *are past. We are not to anticipate future mistakes, or to prescribe for the exercise of a future discretion. How can we know, but that circumstances may hereafter arise, in this very cause, by unforeseen casualties, or extraordinary combinations, which would render it the indispensable duty of the Court of Chancery to restrain the proceedings at law, and which this court would approve of, if the point was judicially before us?

[* 599]

But then, it is said, the Court of Chancery may, perhaps, restrain another trial, by a like temporary injunction; and that this may be repeated, *toties quoties*, and the party be remediless, if such injunctions cannot be appealed from. I answer, in the first place, that such suppositions are not to be indulged. The fair and legal intendment is, that no further injunction will issue without legal cause. The chancellor has informed us why the injunction issued was temporary. He did it for greater caution, and that the parties, as well as himself, might have an opportunity to examine and reflect on the subject, before he determined whether he would or would not enjoin the causes in the Supreme Court, until the final hearing before him. The appellants ought to have waited the result of that deliberation. How could they know, but that the application for a further injunction would be denied? and if it should be, then certainly

the appeal has been vexatious and useless. The appellants have their fit and final remedy. They ought to press for a final decision in chancery upon the merits of the bill. This would not subject them to any very grievous delay; and, indeed, of what consequence is a little delay in a suit, brought to recover damages for a petty trespass, not amounting, perhaps, to five dollars? It is admitted, that the aged witnesses might, at any time, be examined, *de bene esse*, under a rule of the Supreme Court. After a decision upon the merits, either by a decree for a perpetual injunction, or by the award of an issue, 't would, then, be the proper time for the party conceiving himself aggrieved to appeal. The *bringing the cause to a hearing is, then, the proper remedy against the repetition of injunctions. But we are not to anticipate any undue exercise of this power in the court below. A reasonable confidence must be entertained, that every court will exercise its discretion soundly; and the case before us is a striking instance of caution in the application of the power to grant injunctions.

Without, therefore, looking into the merits of the order of the 4th *June*, I am of opinion that, as to that order, the appeal ought to be dismissed. The order being dead, long before the cause came into this court, and the period of its existence being stated in the order at the time it was granted, are facts which form, with me, an insurmountable objection to the appeal.

But other views were taken of this part of the cause, by the appellants' counsel.

One of them admitted, that the injunction was proper, if the cause was properly attached in equity. If the Court of Chancery did right in taking cognizance of the cause, the injunction followed as a matter of course; though, instead of being limited to one circuit, it ought to have continued until the final hearing of the cause. The counsel were, therefore, led to deny, that there was any ingredient of equitable jurisdiction in the case, and to urge, that the bill ought now to be dismissed. My answer to this suggestion is, that the question, on dismissing the bill, does not come properly before us. That question involves the whole merits of the cause, and which have never been discussed and decided upon in the court below. This court made a very sound decision, a few days ago, in the case of *Deas v. Thorne and others*, which was, that on an appeal from an interlocutory order of the Court of Chancery, made before a hearing of the merits, this court would not assume original jurisdiction and examine the merits, but would confine itself to the order. If this decision is to be respected and observed, we cannot, consistently, examine the merits of the bill in the present case. The granting of the temporary injunction of the 4th *June* *may, perhaps, be considered as a decision on the merits of the bill; but this is not the just infer-

IN ERROR

ALBANY,
Feb. 1808.

TRUSTEES OF
HUNTINGTON
V.
NICOLL.

[* 600]

[* 601]

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONv.
NICOLL.

ence from that order. It was a mere step of precaution; a preliminary measure for the occasion, and implies, that the merits had not then been understood or considered. The same argument might have been used in the case of *Deas v. Thorne*. Every interlocutory order may, in one sense, be considered as an opinion, that there is some color for the action; but that is not the consideration upon the merits, intended by our decision, and I am perfectly satisfied, that we cannot, consistently with that decision, give a final opinion on the merits of the bill.

If, however, the court should not concur with me, in this opinion, and should enter into the merits of the bill, I will, then, state the reasons why I think the cause ought to be permitted to proceed. I do not mean by this, that I have formed any definitive opinion, as to what ought to be the decree of the Court of Chancery. Such an opinion cannot safely be formed, until after the proofs shall have been taken and considered. But viewing the cause as it appears before us, I think that there is good color, at least, for sustaining the bill, and that it would be proceeding without precedent, to dismiss a bill after an answer has been put in to the merits, and before those merits have been brought to a hearing in the regular course of the court.

It has not been usual to exhibit a bill in chancery, for quieting a title between two individual claimants, until after several verdicts at law. I do not know, however, that it has been deemed requisite to require any precise number of trials at law, before such a bill of peace can be sustained; and I am inclined to think that there is no positive rule existing as to the number of verdicts which must precede the bill of peace.

In the case of *The Earl of Bath v. Sherwin*, which was decided in the House of Lords, near a century ago, (1 Bro. P. C. 166.) the counsel for the appellants asserted, before the lords, that there were many precedents where *courts of equity granted perpetual injunctions, for quieting inheritances after two trials, and where only one of those trials had been at law. Each case will probably depend, in a degree, upon its peculiar circumstances. These bills of peace were very reasonably introduced to supply a defect of jurisdiction in the courts of law, which permit actions of ejectment to be brought without end, and such actions, therefore, in the hands of a rich adversary, might become engines of oppression and ruin. In many cases, therefore, public justice will loudly call for these bills. But the present bill is not strictly a bill of peace. Its object is not to quiet a title, supported by the single verdict at law, but its object is to prevent a multiplicity of actions, equally vexatious and oppressive to both parties, by asking for the aid of the Court of Chancery to have the title tried under its superintendence, so that there may be a final decision. And when a bill is brought on this

[* 602]

ground of preventing a multiplicity of vexatious suits at law, the question, as to the number of verdicts obtained, does not arise, and cannot be material.

In the case of *Tenham v. Herbert*, (2 *Atk.* 483.) Lord *Hardwicke* observed, that "there were some cases, in which a man might, by a bill of this kind, come into chancery first, and there were others where he ought first to establish his right at law. Where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, and the court will direct an issue, to determine the right, as in disputes between lords of manors and their tenants, and between the tenants of one manor and another; for in these cases, there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and the defendant." These observations are entitled to peculiar weight, since they come from so great a magistrate as Lord *Hardwicke*, who presided for 20 years in the *English* Court of Chancery, and during all that time *only three of his decrees were appealed from, and they were affirmed. The question, then, is, whether the present case does not come fairly within the spirit and principle of this doctrine. The bill states, that the rival claims to the three desolate islands have produced many lawsuits, the greater part whereof had been tried and determined in justices' courts. That in 1802, the respondent's guardians brought three several actions of trespass, all of which were removed into the Supreme Court, and there brought to issue; that one of those actions was brought to trial, at the *Suffolk* circuit, in 1805, and from one of the affidavits in the cause, it would appear to have been tried at an expense to the parties of 500 dollars and upwards. It further appears, that there are two more actions of trespass ready for trial, in which the respondent is plaintiff, and three more actions of trespass, in which the appellants are plaintiffs, and that the actual damages sustained by the trespass, in either case, does not, perhaps, exceed five dollars in amount. If these five actions of trespass, now at issue in the Supreme Court, are to go down to trial, the expense, judging from the former trial, may be computed at about 2,500 dollars for an actual damage of, perhaps, 50 dollars, a circumstance which would certainly reflect no credit upon the justice of the country. The bill further charges, that the trustees of *Huntington*, and the inhabitants of that town, declare it to be their intention, from time to time, to enter, and to encourage others to enter upon the islands, and carry away the grass, and the answer admits and avows the determination. Whether every freeholder and inhabitant of the town of *Huntington* may not, without special license from their trustees, enter and cut

IN ERROR

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTON
V.
NICOLL

[* 603]

IN ERRORALBANY,
Feb. 1802.TRUSTEES OF
HUNTINGTONv.
NICOLL.

[* 604]

grass on these islands, is a question arising upon the construction of their grant, and upon which I am not now prepared to give an opinion. If that should be the case, suits at law might be as numerous as the inhabitants of that town. From the peculiar state of the islands in controversy, the general interest and claim of the inhabitants of *Huntington*, and the numerous suits to which *these contending claims have already given birth, I am strongly impressed with the fitness and expediency of some jurisdiction like that assumed by the Court of Chancery, in which such a litigation may be placed in a train for a solemn and final decision. An attempt seems to have been made by the counsel, to excite our jealousy, as if the Court of Chancery was extending the boundaries of its jurisdiction, and taking cognizance of matters which belong to courts of law. But, in my opinion, such suggestions might well have been spared. The object of the equity power, in such cases, is to prevent endless and destructive suits at law. This object is as benign as it is rational; and those who love justice and hate oppression would, I should think, feel disposed to cherish rather than destroy such a power. It is not true, that when the jurisdiction of such peculiar cases is transferred from the courts of law to the Court of Chancery, that the parties lose the benefit of a *viva voce* examination of their witnesses, and of a trial by jury. It is well known, that such cases are always sent back again, to be tried at the Circuit Court, under a feigned issue. Whether the issue comes from the Court of Chancery, or the Supreme Court, the trial at the circuit is the same; but then, there is this preëminent advantage of having the cause tried under the superintendence of the chancellor, that he can render any one trial final and conclusive upon the right in litigation; and, in this respect, chancery supplies the manifest defect of jurisdiction in a court of law. If one trial, either from the report of the circuit judge, or from its own view of the testimony, does not satisfy the judgment of the Court of Chancery, it will order a second trial at law; and when one or more verdicts shall be satisfactory, as to the right in question, then the Court of Chancery will perpetually enjoin all further lawsuits, and put an end to the contest.

[* 605]

The law, upon this head, is extremely well summed up, by Lord Ch. Baron *Gilbert*, (*Forum Romanum*, 195.) who observes, “ that there is an injunction to prevent multiplicity of suits, as where many suits are depending, and are *likely to happen from one and the same thing. The court will here interpose, and grant an injunction; they will direct a proper issue to try the whole, and all the rest shall be bound by the verdict, or else there might be twenty actions, and as many verdicts, where one proper issue ends the whole, and it is only directing one issue to try many more.”

After this explanation of the object of the jurisdiction of the Court of Chancery in these cases, and after a review of the state of the present vexatious controversy, I am inclined to the opinion, that there are, at least colorable, if not strong, grounds for the present bill, and that it would be premature to dismiss it, before its merits have been duly discussed and considered in the court below.

Another reason why I think the bill sustainable is, that the respondent does not appear to have a clear and adequate remedy at law. The remedy, by an action of ejectment, or a real action, would be attended with circumstances somewhat precarious and doubtful. This difficulty arises from the nature of the subject in dispute, consisting of three islands, incapable of being inhabited or enclosed. If the respondent was to bring the ordinary action of ejectment, he must make out in proof, that the person against whom he brings his suit was in actual possession of the premises, or he would be nonsuited upon the trial; and how would *Nicoll* prove, that the trustees of *Huntington*, or any inhabitant of that town, was in possession of those islands? If acts of entry to cut grass make a person a tenant in possession, then the islands are as much in the possession of one party as the other, for they have mutually entered and cut grass, and there are now mutual actions of trespass pending in the Supreme Court. The truth is, there is not, and cannot be, any actual occupancy of these islands, by any party, beyond these occasional acts of entry, to cut grass or sedge. The law, however, determines this point, by casting the possession of the islands upon the party who has the legal title. The right, in this case, draws with it the possession, and if *Nicoll* admits that the *trustees of *Huntington* are in possession of the islands, he may, possibly, admit away his cause, since they cannot be in possession, in any other way, than by having the title: And if the trustees of *Huntington* are admitted to have been in possession, at the commencement of the action of ejectment, the next inquiry would be, When did that possession commence? A possession for 20 years is a good title in ejectment; and if the town of *Huntington* was in possession of the islands when the suit was brought, it would be very difficult for *Nicoll* to controvert a possession in them of 20 years. But supposing that these difficulties, arising from the admission of the possession in the trustees of *Huntington*, could be surmounted, yet it is unreasonable to drive *Nicoll* to an action of ejectment, because he would, thereby, part with a legal advantage. A jury of *Suffolk* county have recently determined in favor of his right. This appears to have been a very solemn and contested trial. He has, therefore, the best claim to be deemed in possession, and the hazard and difficulty of bringing the ejectment ought to be thrown upon his adversaries.

IN ERROR.

ALBANY,
Feb. 1808.TRUSTEES OF
HUNTINGTONV.
NICOLL

[* 606]

*IN ERROR.*ALBANY,
Feb. 1838.TRUSTEES OF
HUNTINGTON
V.
NICOLL.

Again, if he brings the ejectment, he must not only admit the possession out of him, but his title must be made out clearer than that of the defendant; because, in all doubtful cases, it is the practice of the courts to instruct the jury, to leave the defendant where he is, undisturbed. The whole burthen of making out a good title is cast upon the plaintiff in ejectment; and until that be done, the defendant sits still and protects himself by his possession.

The same doubts and difficulties would arise, if the respondent was to attempt to bring a writ of right, a remedy which was recommended to the respondent by the appellants' counsel. He must admit the inhabitants of *Huntington* to be the actual tenants of the freehold; and he must, on his part, show an actual *seisin* in himself, or in his ancestor, within the last 25 years.

[* 60*]

*To conclude, then, my observations on this part of the subject, I am of opinion, that the appeal, as to the order of the 4th *June*, ought to be dismissed:

1. Because the order was temporary, by the terms of it, and expired before the appeal could be heard.

2. Because we cannot grant any relief in this case, as reversing the order would be useless, and prohibiting a new injunction would be unlawful.

3. Because we cannot, on appeal from such a preliminary order, decide on the merits of the bill.

4. Because, admitting that we could decide on the merits, we ought not to dismiss the bill, as it is brought to prevent numerous and vexatious suits at law, and to put the cause in a way for one final trial and decision; and because a fair, equal and adequate legal remedy to either party is, at least, doubtful, owing to the singular situation of the lands in dispute.

I shall next proceed to examine, briefly, the appeal from the order of the 3d of *June*, directing that the respondent should have leave to examine his guardians as witnesses. The objection to this part of the appeal is, that it is premature. There is no *gravamen*, until the witnesses have been examined, and an attempt made to take their depositions. Perhaps, they never will be examined. The respondent may think it best to waive the examination, or if the witnesses be examined, he may think their testimony unimportant, and may consent to suppress their depositions. To object to this order would be as premature as it would be to object to the issuing of a *subpena* to bring a witness into court, who is alleged to be interested in the cause. The general rule of practice, on this subject, is plainly laid down in *Harrison's Chancery Practice*, (v. 1. p. 589.) which is, that when publication has passed, if either party conceive any of the witnesses to be incompetent, he may make out his objection, and then the deposition of the witness,

so impeached, will not be permitted to be read at the hearing. The examination of witnesses in chancery *is always *de bene esse*, and with a saving of all just exceptions; and whether it be so expressed or not, in the rule, it is always understood.

I am of opinion, accordingly, that there is no ground, and, indeed, that there is no precedent for an appeal from such an order, and that the appeal ought, upon every point, to be dismissed.

IN ERROR.

ALBANY
Feb. 1808.TRUSTEES of
HUNTINGTONv.
NICOLL.

[* 608]

The majority of the court concurring in this opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the petition of appeal, presented by the appellants, be dismissed; and that the record and proceedings brought here be remitted, with this decree, to the Court of Chancery, to be proceeded upon, according to law.

Appeal dismissed.

¶ Mr. Justice THOMPSON was absent, during this session of the Court of Errors, from indisposition.

END OF THE CASES IN ERROR.

* * The cases of *Sands and others v. Codwise and others*, *Rogers and Wife v. Cruger and others*, *M^r Vickar and others v. Wolcott and others*, and *Tillotson v. Cheetham*, on account of their great length, are necessarily postponed to the next volume.



INDEX

TO

THE PRINCIPAL MATTERS

IN THE THIRD VOLUME.

A.

ACT TO REGULATE HIGHWAYS.

ABSENT AND ABSCONDING DEBTORS.

- 1 If an attachment be taken out against a person, as an absent or absconding debtor, and afterwards withdrawn, by consent of creditors, it is inoperative, and gives no right of preference to the *United States*. *M'Lean v. Rankin and Heyer*, 369
- 2 A consignment of goods by a debtor *abroad*, though insolvent, with directions to have them sold, and the proceeds paid to his creditors in *New-York*, is not such an assignment of his property, as will entitle the *United States* to a preference, in the distribution of the proceeds, over other creditors. *ib.*

ACT RELATIVE TO VAN SCHAICK'S AND THE KAYADEROSSERAS PATENTS. (Passed the 12th March, 1793.)

See KAYADEROSSERAS PATENT. EJECTMENT.

Proceedings under the 11th section of the act to regulate highways, are to be in a summary way: the overseer is the judge of the delinquency of the party, and the justice, in issuing a warrant, acts ministerially, and is not bound to give the party notice of the complaint, or to summon him to appear, or show cause against the charge. *Bouton v. Neilson*, 474

See PLEAS AND PLEADINGS, 12

ACT TO GRANT TO TERENCE DONELLY, AND SIX OTHERS, THE EXCLUSIVE RIGHT OF RUNNING STAGE-WAGONS ON THE WEST SIDE OF THE HUDSON RIVER, &c. (Passed February 6, 1803, 26th Sess. c. 20.)

1. The grantees, under an act granting an exclusive right of running stage-wagons on a certain route, by certain resolutions, divided the whole line, and assigned a portion of the route to each grantee, who was to

keep a stage on that part of the route assigned to him, and receive the profits. B., one of the grantees, with the consent of two other of the grantees, besides running a stage on the part of the route assigned to him, also run a stage on the part assigned to A. In an action brought by A. against B. to recover the penalty of 500 dollars, given against any person who should establish a stage on the route described, it was held, that the penalty was given to secure the grantees themselves, in the privilege vested in them, against the encroachment of strangers, and could not be enforced against each other; and that the resolution assigning to each grantee a distinct portion of the road, was not a division or partition of the franchise or right given by the act. *Donnelly v. Vandenberg*, 27

- 2 Whether such a 'privilege or franchise is susceptible of partition, according to the intent of the act, so as to give exclusive and independent rights to the several grantees, in distinct parts of the road, *dubitat*. *ib.*

ACTION.

1. The suing out of the writ is the commencement of the action, and the cause of action must be stated, in the declaration, to have arisen prior to the commencement of the suit. *Cheetham v. Lewis*, 42
- 2 The form of action cannot be objected to, on a motion for a new trial. *Smith v. Elder*, 105
3. An action of trespass on the case lies against a person, for putting on board of the vessel of the plaintiff (being an *American* vessel, bound from *New-York* to *Greenock*, in *Scotland*) certain goods, which, by the laws of *Great Britain*, are prohibited to be imported into that country, in consequence of which the vessel was seized, and the plain-

tiff was compelled to pay a large sum of money to obtain her release. *Smith v. Elder*, 105

4. Where the defendant had agreed to remove his goods from a store, in *May*, 1803, but neglected to do so, in consequence of which the plaintiff, in 1806, was obliged to pay damages to the person to whom he had sold the store; it was held, that the cause of action accrued when the defendant neglected to remove the goods, in 1803, and not when the plaintiff was obliged to pay damages, in 1806. *M'Kerras v. Gardner*, 137
5. No action will lie against a person in this state, for suborning a witness to swear falsely in a cause in another state, whereby judgment was given against the defendant in that cause, contrary to the truth of the case. *Smith v. Lewis*, 157
6. Where a person receives money belonging to another, and applies it to his own use, an action of *assumpsit* will lie against him, by the person to whom the money ought to have been paid. *Dumond v. Carpenter*, 183
7. Where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived with, and worked for the uncle eleven years, and the uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm, as a compensation for his services, but died without devising any thing to his nephew, or making him any compensation; it was held, that an action, on an implied *assumpsit*, would lie against the executors, for the work and labor performed by the nephew for the testator. *Jacobson v. The Executors of Le Grange*, 199
8. Whether an action for a *deceit*, on a *parol* affirmation, which is false, as to the credit of a third person, whereby the plaintiff was induced to trust such

- person, in consequence of which he suffered a loss, is maintainable? *Quere. Ward v. Center,* 271
9. If such an action is maintainable, whether fraud or an *intent*, on the part of the defendant, to *deceive* the plaintiff, or some *collusion* between the defendant and the person recommended, must not be proved? *Quere. ib.*
10. An action for money had and received will not lie to recover back part of the consideration-money paid and expressed in a deed, on the ground of a deficiency in the number of acres, in the tract of land, which the grantee had previously agreed to purchase at a certain sum *per acre. Howes v. Barker,* 506

ADMINISTRATOR

See EXECUTOR

AFFIDAVIT.

See PRACTICE, 4, 5. 10. 15. 21. 32. 44.
47, 48. 52.

AGENT.

See SALE OF GOODS. WITNESS.

AGREEMENT.

See DEED, 4, 5. BILLS OF EXCHANGE
AND PROMISSORY NOTES, 6. CON-
TRACT.

AMENDMENT.

- 1 After an assignment of errors, and joinder in the Court for the Correction of Errors, this court, on motion, will amend the original record, in matters of form; for the original record remains in the Supreme Court, the transcript only being sent up with the writ of error. *Tillotson v. Cheetham,* 95

2. After argument of a *case*, and before judgment, the case was allowed to be amended, at the instance of the defendant, on payment of the costs of the argument, and giving to the plaintiff, also, the election, afterwards, to be nonsuited, or to have a new trial. *Jackson, ex dem. Colden, v. Brownel,* 140
3. After an assignment of errors, it is too late to move that the return to a writ of error be amended *Du-
mond v. Carpenter,* 141
4. A *ca. sa.* on which the defendant had been taken, was allowed to be amended, by adding the *testatum* clause. *M'Intire v. Rowan,* 144
5. A declaration in covenant was amended, by adding a new count on another covenant in the same deed. *Harris v. Wadsworth,* 257
6. Where a *feri facias*, after it had been levied, was burnt by accident, the court ordered a new *feri facias* to be made out, *nunc pro tunc*, and delivered to the sheriff. *White v. Lovejoy,* 448
7. A judgment had been entered up, upon a warrant of attorney, and the same was regularly signed and docketed, but by negligence of the attorney, the plea of the defendant was not signed by him, nor was the name of the defendant's attorney inserted in the record. The plaintiff was allowed to amend the record, *nunc pro tunc*, by inserting the name of the defendant's attorney, though a subsequent judgment had been entered up against the defendant, on which a preference was claimed. *Close v. Gillespey,* 526

APPEAL.

See PRACTICE IN THE COURT OF
ERRORS.

ASSESSMENT OF DAMAGES.

After a judgment by default, in a court
of common pleas, a jury was sum-
471

moned to inquire of the damages, which were assessed in the presence of the court, and a judgment entered for the amount, without any *inquisition* being returned by the jury, and on a writ of error to this court, it was held to be regular, as the court may themselves assess the damages, without the intervention of a jury. *McCullum v. Barker*, 153

ASSIGNEE.

The court will take notice of, and protect, the rights of an assignee of a chose in action. *Littlefield v. Storey*, 425

ASSUMPSIT.

See ACTION. FRAUDS, STATUTE OF.

ATTAINDER, ACT OF.

A person who removed within the *British* lines during the *American* war, and died there in *June*, 1777, was presented by the grand jury, and indicted the 5th *May*, 1780, under the act of attainder, of the 22d *October*, 1779, for an offence charged to have been committed on the 15th *April*, 1777; and being convicted, judgment was signed on the 14th *July*, 1783, and his estate forfeited and sold. In an action of ejectment, brought against persons deriving title under the sale by the commissioners of forfeitures, it was held, that the proceedings were regular, according to the act, and were not now to be questioned, and that the judgment was valid and effectual. *Jackson, ex dem. Williams and others, v. Stokes and Thomson*, 151

ATTORNEY.

- 1 Where an attorney gave a receipt 472

for a promissory note, without expressing the purpose for which he received it, it was held, that the presumption was, that he received it to be collected, and this presumption, confirmed by other circumstances, was sufficient evidence to support an action against him by the payee of the note, for neglect in not suing the maker. *Smedes v. Elmendorf*, 185

2. A certificate of *clerkship* by an attorney must state, that the clerk has served his clerkship regularly in the office of the attorney, 261

See COSTS, 1.

AWARD.

Where an award, on the face of it, is final, nothing, *dehors* the award, can be pleaded, or given in evidence against it. *Barlow v. Todd*, 357

See PLEAS AND PLEADINGS 10.

B.

BAIL.

1. Where the bail, on a return of *non est inventus* on the *ca. sa.* against the principal, gave a note to the plaintiff for the amount of the judgment, which was, afterwards, reversed, on a writ of error; it was held, that as the bail were not fixed, and the judgment was reversed, there was a failure of consideration, and the plaintiff could not recover on the note. *Tappen v. Van Wagenen*, 465
2. Before a suit can be commenced against bail, a *ca. sa.* or *test. ca. sa.* against the principal must be sued out, and actually returned

with *non est inventus* endorsed thereon, and filed in the clerk's office. *Pearsall v. Lawrence and Doe*, 514

See PRACTICE, 45.

BAILMENT.

Where a slave was delivered to a person to be kept, or upon trial, and the bailee suffered the slave to go to the next village in the evening, when the slave ran away, it was held, that the bailee was not responsible. *De Foncleur v. Shottenkirk*, 170

BANKRUPT.

F. and S., being in embarrassed circumstances, on the 13th *June*, 1800, drew an order on one F., their agent, directing him to pay to R. such moneys as should come to his hands from certain persons in *Europe*, from whom F. had been authorized to receive the amount of certain policies of insurance, which order F. accepted on the same day, to pay the moneys as soon as they came into his hands. On the 11th *July*, 1800, M. and S. committed an act of bankruptcy, and on the 18th *July*, 1800, were duly declared bankrupts. In an action, brought by the assignees of M. and S. against F., it was held, that the order and acceptance amounted to an assignment, and fixed the fund irrevocably, and that the order was not given in contemplation of bankruptcy, so as to render it fraudulent under the bankrupt law. *M Menomy and Townsend, Assignees, &c., v. Ferrers*, 71

BARGAIN AND SALE.

See DEED, 6, 7.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the endorser of a note, which has not been paid by the maker, promises to pay the holder, a previous demand on the maker, and notice to the endorser, need not be proved, but will be presumed. *Pierson v. Hooker*, 68
2. Where a bill of exchange was drawn on a person in *Liverpool*, payable in *London*, and the bill was duly presented at *Liverpool*, and protested for non-acceptance, and afterwards protested for non-payment at *Liverpool*, where the drawee resided; it was held, that the holder had a good right of action against the drawer, on the protest for non-acceptance; that it was not necessary to set forth a protest for non-payment in the declaration; and if set forth, it might, on demurrer, be rejected as surplusage; that as no place in *London* was designated in the bill, for its payment, the protest for non-payment at *Liverpool* was sufficient; and that the holder might, at his election, cause the bill to be protested for non-payment, either in *London*, or at the place where the drawee resided. *Mason and Smedes v. Franklin*, 202
3. A similar bill of exchange, after being protested for non-acceptance at *Liverpool*, was protested for non-payment in *London*, and the declaration stated, "that the bill not being paid, and the holders, not knowing where to present the same for payment in *London*, caused the same to be protested," &c. It was held that the protest for non-payment was sufficient; and that where no place in *London* was specified in a bill, the holder is not bound to make any inquiry after the drawer there. *Boot and Bentley v. Franklin*, 207
4. Where a creditor received from his debtor an order on a third person,

for the amount of his debt, the 9th December, 1804, and which the drawer agreed to pay in 10 or 15 days, and the order was not presented for payment until *March*, or many weeks after, and the drawee in the mean time failed, it was held, that the holder had not used due diligence, and must bear the loss.

Brower v. Jones, 230

- 5 If the payee of a note, payable to bearer, puts his name on the back, he may be sued as endorser, in the same manner, as if it was payable to order. *Brush v. Reeves*, 439

- 6 C. gave his bond to B. for a certain sum of money, on the payment of which, B. agreed to convey a certain quantity of land to C. B. delivered the bond to F., with an authority to receive the money; and C. together with G. gave their joint and several promissory note to F. for the amount of the bond, which was given up to C. In an action brought on the note by F. against G. it was held, that G. could not set up, as a defence against the note, an agreement by F. that in case B. would not consider the note as a payment of the bond, it should be returned; nor a want of consideration, by reason of a failure of B. to convey the land to C. *Parsons v. Administrators of Gaylord*, 463

- 7 Where, on the return of *non est inventus* on the *ca. sa.* against the principal in a suit, the bail gave a note for the amount of the judgment, which was, afterwards, reversed on a writ of error, it was held, that as the bail were not fixed before the judgment was reversed, there was a failure of the consideration of the note, and the plaintiff could not recover. *Tappen v. Van Wagenen*, 465

BILL IN CHANCERY.

Where a bill is filed in chancery, for the purpose of preventing a multiplicity
474

of suits at law, and to have the title to land finally settled in one suit, under the direction of the chancellor, it seems, that the bill will be sustained, though there has been but one trial at law. *Trustees of Huntington and others v. Nicoll*, 566

BOND.

The time of the performance of the condition of a bond may be enlarged by a *parol* agreement between the parties. *Fleming v. Gilbert*, 528

BOTTOMRY BOND.

A master of a ship may, in case of necessity, *bona fide*, bottomry a ship, at her port of destination, as well as at any foreign port. *Reade and Jephson v. Commercial Insurance Company*, 352

C.

COMMISSIONERS OF THE LAND OFFICE.

The commissioners of the land-office had a right to grant certain lots of land, reserved by the act of the legislature of the 8th February, 1789, to make up certain deficiencies therein mentioned, where application for a compensation for such deficiency was not made before the 1st January, 1798, the lots so reserved and not applied for before that time, being unappropriated lands. A person in possession of such a lot, in an action brought against him by the patentee, is not entitled to any compensation for his improvements. *Jackson, ex dem. Hornbeck, v. Seaman*, 495

CONTEMPT.

See PRACTICE, 1, 2.

CONTRACT.

If a person sends an order to a merchant for a particular quantity of goods, on certain terms of credit, and the merchant sends a less quantity, at a shorter credit, and the goods so sent are lost by the way, the merchant must bear the loss, for there is no contract, express or implied, between the parties. *Bruce and Bruce v. Pearson*, 534

CORPORATION.

1. In an action of ejectment, brought by the trustees of the parish of *Newburgh*, elected pursuant to a charter of incorporation, in 1752, against a tenant holding possession under the trustees, elected pursuant to an act of the legislature, passed in April, 1803, to recover the *glebe*, (part of 500 acres of land, granted by the charter in 1752, for the use of a minister of the church of *England*,) it was held, that as long as the conflicting claims of the two sets of trustees, both elected under color of right, remained undetermined, the possession of a tenant, under either, could not be disturbed; and that such conflicting claims could not be decided in this suit. *Jackson, ex dem. The Rector, &c. of St. George's Church, in the Parish of Newburgh, and others, v. Nestles*, 115
2. Where two trustees, being a corporation, signed their names separately to a lease, and affixed the corporate seal to each name, it was held to be a good execution of the lease. *Jackson, ex dem. Donally and others, v. Walsh*, 226

3. Entries made by a clerk in the books of a corporation, by direction of the trustees, are not evidence in a case in which they are interested; nor is the evidence of the clerk, as to their declarations, admissible. *ib.*

COSTS.

1. Where a judgment is obtained against an attorney in this court, for less than 250 dollars, the plaintiff is, nevertheless, entitled to full costs. *Varian v. Ogilvie*, 450
2. In an action on the case, for overflowing the plaintiff's land, the defendant pleaded not guilty, and gave in evidence a permission from the plaintiff to erect a dam and overflow his land, if necessary. The plaintiff proved a revocation of the license, and the jury found a verdict for the plaintiff for 9 dollars damages; it was held that the title did not come into question, so as to entitle the plaintiff to full costs under the statute. *Otis v. Hall*, 450
3. No costs are allowed in the Court of Errors, on the reversal of a judgment or decree of the court below. *Farquharson v. Mabee*, 553

COVENANT.

1. Where A. conveyed land to B., and the deed contained a covenant of seisin, &c., and B. afterwards reconveyed the land to A., it was held, that the reconveyance of the land did not extinguish the covenants in A.'s deed, but that B. might maintain an action for a breach thereof, against A. *Bennet and Wife v. Irwin*, 363
2. M. gave a deed to W., and covenanted that he would warrant and defend W. in the quiet and peaceable possession of the premises. At the time of the conveyance, there was a previous mortgage on the land, 475

and a suit in chancery was afterwards brought by the mortgagee, and a sale of the premises decreed; and W. purchased the same at the master's sale, and then brought an action against M. for a breach of the covenant of warranty for peaceable enjoyment; and it was held, that an action could not be maintained on the covenant, until there had been an eviction or actual ouster, by a paramount lawful title. *Waldron v. M'Carthy*, 471

See PLEAS AND PLEADINGS, 9. RENT.

COURT OF CHANCERY.

See BILL IN CHANCERY. PRACTICE IN THE COURT OF ERRORS.

COURT OF COMMON PLEAS.

1. If the judgment of an inferior court be correct and legal, no writ of error lies for any irregularity in issuing the execution. *Dumond v. Carpenter*, 141
2. Each court has a control over its own process, and if there be any irregularity, the proper remedy is to apply to the court where it issued. *ib.*

COURT OF GENERAL SESSIONS.

1. The Court of Sessions are judges of the law and the fact, and a *bill of exceptions* does not lie to that court. *Saet v. Overseers of the Poor of Clinton*, 23
2. This court may, by *certiorari*, order the sessions to return all the facts and proceedings before them. *ib.*

476

D.

DEED.

1. A deed for a military lot of land in the county of *Onondaga*, dated in *June*, 1794, and proved the 5th *September*, 1797, in the manner prescribed by the act of the 11th *February*, 1797, was held to be sufficiently proved to be recorded; and the transcript of the record of a deed so proved may be read in evidence. *Jackson, ex dem. Dunbar and others, v. Todd*, 300
2. Where a deed will enure several ways, the grantee shall have his election which way to take it. *Jackson, ex dem. Klock, v. Hudson*, 375
3. An exception in a deed shall be taken most favorably to the grantee, and if the thing excepted be not set down or described with certainty, the grantee shall have all the benefit which may arise from such defect. *ib.*
4. A writing in the form of articles of agreement, containing a covenant to convey lands, and concluding with a penalty for the non-performance of the covenant, though it contained words of bargain and sale, or an absolute conveyance, *in presenti*, to one of the parties and to his heirs, was held to be no more than an agreement to convey. *Jackson, ex dem. Ludlow, v. Meyer*, 388
5. The intent of the parties to an agreement or deed, when apparent, and not contrary to any rule of law, will control the technical words used in the instrument. *ib.*
6. A bargain and sale of land to A. "to hold the same to A. in trust for B. and C. and their respective heirs and assigns for ever, in fee simple," creates only a life estate in A., and at his death, the legal estate reverts to the grantor, and B. and C. can

only resort to a court of equity to enforce the trust. *ib.*

- . A use in a bargain and sale can be limited only to the bargainee, who cannot be seised to any other use but his own. *Jackson, ex dem. Ludlow, v. Meyer,* 388

- b. P. gave to G. a writing as follows: "This is to certify, that I have bargained and sold the one half of lot No. 30, in the location of the *Great Sable*, for 14s. per acre, to *Rufus Greene*, the interest to commence from the 1st *July*, 1792;" it was held, that this was a mere agreement for a conveyance, and did not amount to a conveyance or lease. *Jackson, ex dem. Green, v. Clark,* 424

- . The words "for value received," in a deed, import a sufficient consideration to raise a use to the bargainor; and the words "make over and grant" are sufficiently operative to convey lands by way of a use. *Jackson, ex dem. Hudson and Chapman, v. Alexander,* 484

DEED LOST.

See EVIDENCE, 8.

DEMURRAGE.

- . the owner of a ship, entered into a written agreement with B. to carry certain goods in the vessel from *New-York to Surinam*, and to bring back a certain cargo from that place to *New-York*; and B. agreed to pay 2,600 dollars for the freight; but if accident should prevent the delivery of the return cargo, then he was to pay only 1,300 dollars, and R. engaged that the vessel should lie 35 days at *Surinam*, to unload and reload. The vessel staid the 35 days, and the return

cargo not being ready, she staid 20 days longer, at the request of the agent and consignee of B., who had no control over the vessel: and having brought back the return cargo, B. paid the 2,600 dollars freight. In an action of *assumpsit*, brought by R. against B. to recover a compensation for the detention of the vessel beyond the time stipulated, in the nature of demurrage, it was held, that as the written contract contained no stipulation to pay demurrage, and no implied *assumpsit* to pay it could arise from the act of the consignee of the goods, who had no authority to bind B. as to demurrage, the plaintiff was not entitled to recover. *Robertson v. Bethune and Boorman,* 342

DEVISE

Where A. devised "all his estate, real and personal, to his six children, to be equally divided between them, share and share alike; but if any of them died before arriving at full age, or without lawful issue, that then his, her, or their part or share should devolve upon and be equally divided among the surviving children, and to their heirs and assigns for ever;" this was held to be a good devise over, by way of executory devise, and that the share of one of the children, who died without issue, after the death of four of the other children who left issue, went to the only surviving child. *Jackson, ex dem. Burhans and Wife, v. Blanshan,* 291

DETINUE.

See TROVER
477

E.

EJECTMENT.

1. In an action of *ejectment*, on several demises, one of which was from the trustees of the parish of *Newburgh*, brought to recover the possession of the *glebe*, part of 500 acres of land, granted by charter of incorporation, in 1752, for the use of a minister of the church of *England*, against a tenant, claiming to hold under the trustees of the same parish, elected pursuant to an act of the legislature, passed in *April*, 1803, relative to the same *glebe*, it was held, that the lessors of the plaintiff were not entitled to recover the premises against the tenant in possession. *Jackson, ex dem. The Rector, &c. of St. George's Church, in the Parish of Newburgh, and others, v. Nestles,* 115
2. An acknowledgment, by a defendant, in an action of ejectment, that he went into possession under one of the lessors of the plaintiff, was held sufficient evidence to enable the plaintiff to recover; it being a matter of fact for the jury to decide, whether the defendant held under any of the lessors of the plaintiff, or not. *Jackson, ex dem. Sagoharie and others, v. Dobbin,* 223
3. W., having been turned out of the possession of a lot of land, under a judgment by default against him, in an action of ejectment by D., afterwards brought his action of ejectment to recover the possession, and showed that he, and those under whom he claimed, had been in the actual and quiet possession of the premises in question, from 1765 to 1803, when he was ejected by D. It was held, that such a possession was a sufficient and conclusive evidence of title, notwithstanding that, by a recent survey of the tract, and, according to a partition deed of 1744, the premises in question were actually included in the bounds of an adjoining lot, released to D., by the deed of partition under which those under whom W. claimed, originally took possession, and although W. had suffered a judgment by default against him. *Jackson, ex dem. Wright and others, v. Dieffendorf and Zoller,* 269
4. Where a location is made, under a deed and survey, and an undisturbed possession held according to such location for 38 years, it shall prevail, though, by a subsequent survey, it appear that such location was not accurately made. *ib.*
5. A., as the owner of land in the patent of *Van Shaick*, permitted B., in 1791, to occupy the land, for which B. paid him rent. In 1794, commissioners appointed by the legislature to settle the boundaries between the patent of *Van Shaick* and that of *Kayaderosseras*, made an award, by which the land of A. was determined to be within the latter patent, on which A. said he gave up all claim to the land, and B., with the knowledge of A., purchased it of the proprietors, under the *Kayaderosseras* patent. Ten years after, during which time no rent was demanded of B., A., conceiving himself not bound by the award of the commissioners, brought an action of ejectment against B., and attempted to recover on the ground of the possession of B., as his tenant, from 1791: it was held that A., having so long acquiesced in the award of the commissioners, and having permitted B. to *attorn* to a stranger, could not recover on his tenancy or possession, but must prove a title. *Jackson, ex dem. Waldron, v. Wellen,* 283
6. Where the defendant in *ejectment* sets up an outstanding title, it must

- be a present, subsisting and operative title, otherwise, the presumption is, that such title in a stranger has been extinguished. *Jackson, ex dem. Klock, v. Hudson*, 375
7. The possession of the native *Indians* is not such an adverse possession, as to render subsequent alienations by patentees of the land possessed by them void, on the ground of *maintenance*. *ib.*
 8. An outstanding title, in certain *Indians* of the *Mohawk* tribe, was held to be extinguished, as the title had never been claimed or asserted, and the tribe or nation had become extinct. *ib.*
 9. When the plaintiff in ejectment claims to recover on the ground of a prior possession, that possession must be clearly and unequivocally proved. *Jackson, ex dem. Ludlow, v. Meyer*, 388
 10. The payment of taxes, and the execution of partition deeds, are not evidence of an actual possession, though they show a claim of title. *ib.*
 11. An equitable title cannot be set up, in ejectment, against the legal estate. *Jackson, ex dem. Whitbeck and Gardenier, v. Deyo*, 424
 12. A person in possession of land, and who claims to hold *in fee*, is not entitled to notice to quit, previous to bringing the action of ejectment; but there must be a tenancy, or existing relation of landlord and tenant. *ib.*
 13. In ejectment, the plaintiff relied on a judgment in partition only, and that being void, it was held, that he could not recover, in such case, his undivided share, without deducing a regular title, as if no judgment had been rendered. *Jackson, ex dem. Antell, v. Brown*, 459
 14. After a recovery in ejectment by *default*, against the *casual ejector*, the lessor of the plaintiff may maintain trespass for the *mesne profits*, against the tenant, and may also recover the costs of the action of ejectment; and the defendant is not allowed to offer any thing in evidence against the demand of the plaintiff which might have been set up in the original action. *Baron v. Abeel*, 481
 15. An acknowledgment, by a person under whom the defendant claims to hold, that he went into possession under the lessors of the plaintiff, is conclusive against the defendant, as to the tenancy. *Jackson, ex dem. Vandeuzen, v. Scissam*, 499

See PRACTICE, 34.

ESCHEAT.

- On a traverse of an inquest of office found, in behalf of the people, in a case of *escheat*, the traverser is considered as a defendant, and if he shows that the people have no title, though he prove nothing but a bare possession in himself, he will be entitled to judgment. *The People v. Cutting*, 1

EVIDENCE.

1. Where a creditor executed a release, under his hand and seal, to his debtor, of all demands, parol evidence is not admissible to show that a particular debt was intended to be released. *Pierson v. Hooker*, 68
2. In an action of trespass on the case, brought against the defendant, for putting on board of an *American* vessel, bound from *New-York* to *Greenock*, in *Scotland*, goods which, by the laws of *Great Britain*, were prohibited from being imported into that country, in foreign vessels, in consequence of which, the plaintiff's vessel was seized at *Greenock*, and the master was compelled to pay a large sum 479

- of money to obtain her release; it was held that the *confession* of the defendant that she did carry contraband goods in the vessel, and that the vessel was seized in consequence, and the testimony of the master, that the goods so carried by the defendant were *contraband* by the laws of *England*, were sufficient evidence, in this case, of the law of *Great Britain* on the subject. *Smith v. Elder*, 105
3. An implied or resulting trust may be proved by *parol*. *Foot and Litchfield v. Colvin and others*, 216
 4. Nine years is not a sufficient lapse of time to afford a presumption of reëntry for the non-payment of rent. *Jackson, ex dem. Donally and others, v. Walsh*, 226
 5. Entries made by a clerk, in the books of trustees, being a corporation, by their direction, are not evidence in a cause, in which they are interested. *ib.*
 6. The evidence of the clerk who made the entry in the books, of the declarations of the trustees, is not admissible. *ib.*
 7. Where A. and B. applied to C. to purchase goods for A., who was recommended by B., and by their direction, the goods were sent to B.'s house, who afterwards took a bill of sale of them from A., who absconded without paying C., in an action of trover, brought by C. against B., for the goods, it was held, that C. might go into evidence, to show that the goods had been obtained from him fraudulently, and by collusion between A. and B., under pretence of a purchase; and that the plaintiff might give evidence of subsequent acts of collusion and fraud by A. and B. to obtain goods from other persons, in order to show the fraudulent intention of A. and B. in regard to C., and which the jury might infer from the circumstances. *Allison v. Matthieu*, 235
 8. In order to entitle a *will* to be read 480
 - in evidence, as an *ancient deed*, without further proof than its production, it must be, at least, 30 years old, from the death of the testator; for the age of the will must be computed from the death of the testator, not from its date. *Jackson, ex dem. Burhans and Wife, v. Blanshan*, 292
 9. Evidence by a person, that he had delivered a deed to the clerk of the county to be recorded, and that search had been made in the clerk's office, where it could not be found, is not sufficient evidence of the loss of the deed, so as to entitle the party to read a copy in evidence, unless it be proved, that the deed was never re-delivered by the clerk. *Jackson, ex dem. Dunbar and others, v. Todd*, 300
 10. Copies of the proceedings of foreign courts or tribunals, though under the hands and seals of the officers of such courts, are not, of themselves, evidence, but must be proved like other facts. *Delafeld v. Hard*, 310
 11. The delivery of a paper by a plaintiff, in an action on a policy of insurance, to a broker, to enable him to adjust a loss, will not make that paper good evidence in another suit, brought by one of the parties against the master of the vessel insured. *ib.*
 12. Parol evidence is admissible to explain a written receipt. *M'Instry v. Pearsall*, 319
 13. In the case of a public officer, as a sheriff, &c., it is sufficient to prove, that he acted as a public officer, without producing his appointment. *Potter v. Luther*, 431
 14. Where there is a subscribing witness to a *bond*, proof of the confession of the obligor is not sufficient; but the witness must be produced, or, in case he is dead or out of the state, his hand-writing must be proved. *Fox and Payne v. Reil*, 477
 15. B., having agreed to convey to H

a tract of land containing a certain number of acres, at 9*l.* per acre, executed a deed accordingly, mentioning the number of acres, and H. paid the consideration-money, according to that number, at 9*l.* per acre. In an action for money had and received, brought by H. to recover back a part of the consideration paid, on the ground of a mistake in the number of acres, it was held, that parol evidence was not admissible to show the mistake as to the quantity, and that the action was not maintainable. *Howes v. Barker*, 506

16. Where certain acts were done by an obligor, amounting to a substantial, though not a literal, performance of the condition of the bond, it was held, that evidence of a *parol* agreement of the obligee, to enlarge the time of performance, or to waive any further performance, was admissible. *Fleming v. Gilbert*, 528

See DEED, 1.

EXECUTOR AND ADMINISTRATOR.

Where an executor or administrator brings a wrong action by mistake, he will be allowed to discontinue, without paying costs. *Phœnix, Administrator, v. Hill*, 249

EXECUTION.

1. Where A. bought land with the money of B., and took a deed to himself, it was held, that he was a mere trustee of B., and that the land might be seized and sold under an execution against B., the *cestui que trust*. *Foot and Litchfield v. Colvin and others*, 216
2. An execution which is set aside for
VOL. III. 61

irregularity is considered as a nullity, and an action of trover will lie for goods taken upon it. *Read v. Markle*, 523

F.

FRAUD.

Whether there be fraud or not, is a question of fact for the jury to decide. *Ward v. Center*, 271

See ACTION, 8, 9.

FRAUDS, STATUTE OF.

1. By the 11th section of the statute to prevent frauds, it is said, "that no person shall be charged upon any promise, &c., unless the *agreement* on which such action shall be brought, or some note or memorandum thereof shall be in writing," &c. In an action on an agreement relative to the sale of lands, it was held, that the *consideration* for the promise, as well as the *promise* itself, must be in writing. *Sears v. Brink and Brink*, 210
2. An implied or resulting trust is not within the statute of frauds, but may be proved by parol. *Foot and Litchfield v. Colvin and others*, 216
3. An entry made by the vendor of goods, in his book of sales, of the name of the purchaser, and the terms of the contract of sale, which was read to the agent of the vendee who made the purchase, and assented to by him as correct, was held not to be a sufficient memorandum in writing within the statute of frauds, it not being signed by the party to be charged, or by his agent. *Bailey and Bogert v. Ogden*, 399
4. Whether the vendor is bound by such a memorandum, so that the
481

- vendee can enforce the contract against him? *Quere. Bailey and Bogert v. Ogden*, 399
5. The form of the memorandum of the bargain is not material, but it must state the contract with reasonable certainty, so that the substance of it can be understood, from the writing itself, without resorting to parol proof, *ib.*
 6. An actual delivery of goods, or a part of them, is not required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances, however, which ought to be held tantamount to an actual delivery, ought to be so strong as to leave no doubt of the intention of the parties. *ib.*
 7. An agreement with the vendor about the storage of the goods, and a delivery by him of the *export entry*, to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indicium* of ownership. *ib.*
- agreement to the contrary. *Watson v. Duykinck*, 335
3. Where A., "in consideration of 100 dollars to be paid immediately, agreed that he would suffer B. to proceed and go in A.'s vessel, as a passenger, from *New-York* to *St. Thomas's*, and to load on board for transportation, goods to the value of 600 dollars," and B. paid down the 100 dollars, and went on board with his goods; and the vessel, soon after the commencement of the voyage, was shipwrecked and lost, but the goods saved: and B. brought an action, for money had and received to his use, against A., to recover back the 100 dollars; it was held, that this was an agreement to receive B. and his goods on board, and not an agreement to transport and deliver them at *St. Thomas's*, so as to entitle the plaintiff to recover back the money advanced for the passage and freight: The consideration in this case, for the payment of the money, being the receiving of B and his goods on board, and not the transportation and delivery of them. *ib.*

See SALE OF GOODS.

See DEMURRA &c.

FREIGHT.

1. Where goods are carried to the place of their destination, though so much spoiled as to be of no value, the owner cannot abandon the goods for the freight; but the master is entitled to the full freight for the transportation of them. *Griswold and Griswold v. The New-York Insurance Company*, 321
2. Where freight is paid in advance, on a contract for the transportation of goods, and the vessel is shipwrecked, so that the voyage is broken up, the master or owner is bound to refund the freight paid in advance, unless there is a special

G.

GUARDIANS

See PRACTICE IN THE COURT OF ERRORS.

I & J.

JEOFAILS.

Where a term intervenes between the *teste* and return of a writ of inquiry,

which is a miscontinuance, it is cured by the statute of *jeofails*.
Dumond v. Carpenter, 183

IMPROVEMENTS ON LAND.

1. A person who has settled on land in the military tract, under color of a *bona fide* purchase, made prior to the 5th April, 1803, cannot be turned out of possession, until he is paid for his improvements, according to the act of the 5th April, 1803. *Jackson, ex dem. Heet and Gourley, v. Bush*, 512
2. A person in possession of a lot of land, reserved by the act of the legislature, of the 8th February, 1789, and which has been patented by the commissioners of the land-office, is not entitled to any compensation for his improvements on the land, from the patentee, who has recovered in an action against him. *Jackson, ex dem. Hornbeck, v. Seaman*, 495

INDIANS.

1. The possession of land by *Indians* does not affect the validity of patents granted by the state, for the lands, to others, without their consent. *Jackson, ex dem. Klock, v. Hudson*, 475
2. An outstanding title in certain *Indians* of the *Mohawk* tribe was held to be extinguished, as the title had never been claimed or asserted, and the tribe or nation had become extinct. *ib.*

See PATENT, 2. EJECTMENT, 7.

INDICTMENT.

Where an indictment stated that the prisoner, with force and arms, to

wit, with knives, &c., made an assault upon E. G., with intent to commit murder on him, and did then and there, cut, beat, strike, wound and ill treat the said E. G., to his damage, and against the peace, &c., it was held to be a sufficient indictment for an assault, with intent to kill. It is enough to state, with the usual precision, the facts necessary to constitute an assault and battery, and aver the intent with which it was made. *The People v. Pettit*, 511

INQUEST OF OFFICE

See ESCHEAT.

INSOLVENT DEBTOR ACT.

To entitle the *United States* to a preference over other creditors, it must be shown that the debtor was insolvent, and voluntarily assigned *all* his property for the benefit of his creditors; or that an attachment had been taken out against his property, as an absent or absconding debtor, and prosecuted to effect. *M'Lean v. Rankin and Heyer*, 369

INSURANCE.

1. A vessel and freight were insured by the same underwriters, by two different and open policies of insurance, on a voyage from *New-York* to the river *La Plata*, and at and from thence to a port in *Europe*. The ship arrived at *Buenos Ayres*, on the 13th February, 1802, under a charter-party for freight, and delivered her cargo there, but was detained by an *embargo*, until the 1st October, 1802, when she sailed for *Havre de*

Grace, in *France*, where she arrived in *December*, 1802. An abandonment of the ship and freight was made on the 29th *June*, 1802, but not accepted. In an action on the policy on the *freight*, it was held, that the insured was entitled to recover as for a total loss. *Livingston v. The Columbian Insurance Company*, 49

2. Freight is a distinct subject of insurance, and a previous abandonment of the ship to one insurer will not prevent the insured from recovering the freight insured by another. *ib.*
3. Whether the abandonment of the ship deprives the insurer of freight of his salvage? *Quere. ib.*
4. Whether the insurer on the ship is to account to the insurer on the *freight*, for the freight earned subsequent to the abandonment? *Quere. ib.*
5. Goods were insured from *New-York* to *Bourdeaux*. The policy contained the usual printed clause, "To be free from any loss which may arise, in consequence of any seizure or detention for or on account of any illicit or prohibited trade;" and also the following written clause; "Warranted not to abandon, if turned away, nor, if captured, until condemned." While on her voyage, the vessel was captured and sent into *England*. On the 18th *November*, 1803, the ship and cargo were released, and the ship, afterwards, proceeded on her voyage, and reached *Verdun*, at the entrance of the *Garonne*, in *France*, on the 16th *January*, 1804. The vessel and cargo were seized and detained by the officers of the *French* government at *Bourdeaux*, and she was not suffered to unlade any part of her cargo; and was, afterwards, ordered to leave the territory of *France*. The reason assigned for the prohibition was, that the ship had come direct from *England*. The ship with the cargo

proceeded, afterwards, to *St. Sebastian's*, in *Spain*, where part of the cargo was sold, and she returned in ballast to *Bourdeaux*, and the residue of the cargo unsold was shipped to *Bourdeaux*, and there sold. On being advised of the situation of the vessel and cargo at *Bourdeaux*, the insured abandoned as for a total loss, on the 18th *May*, 1804. It was held, that under the written clause in the policy, the insured were only entitled to recover for a partial loss, for expenses and average from the time the vessel was captured until her arrival at *Bourdeaux*. *Speir v. New-York Insurance Company*, 88

6. As to the effect of such a prohibition by the *French* government, without the special clause in the policy, *Quere. ib.*
7. Goods were insured from *Nevitas*, in the island of *Cuba*, "beginning the adventure, &c. from and immediately following the lading thereof on board of the vessel at *Nevitas*, in *Cuba*." The vessel sailed with a cargo of goods from *New-York*, and arrived at *Nevitas*; but not being allowed to land the goods there, except a few trifling articles, she sailed from *Nevitas*, with the outward cargo on board, for *Jamaica*, and while proceeding to that place, was wholly lost by the perils of the sea. It was held, that the policy did not attach to the *outward cargo*, which continued on board at *Nevitas*, and until the vessel was lost; and the insured were only entitled to a return of premium. *Richards v. The Marine Insurance Company*, 307
8. Insurance on freight from *New-York* to *Barcelona*. The vessel, in going out of port, and while proceeding on the voyage insured, was stranded, in consequence of which the cargo, consisting of flour, was so much damaged, that, had it been carried to the port of destination, it would not have been worth the

freight. Information of the accident was given to the insurer on the day it happened, and two days thereafter, the insured abandoned as for a total loss. The vessel was repaired, and in a capacity to prosecute the voyage in 17 days, and at an expense of about 150 dollars. The cargo, which had been insured by the underwriters, was also abandoned to them, and the abandonment accepted. The cargo was sold at auction, at a loss of about 27 per cent. It was held, that the insured on the policy on the freight had no right to abandon, but ought to have offered to the owners of the cargo to carry it to its place of destination, so as to have entitled themselves to the freight. *Griswold and Griswold v. The New-York Insurance Company*, 321

- 9 The acts of the agent of the insurer, in saving the cargo, and being present at the unloading and delivery, will not amount to an acceptance of an abandonment, or justify the inference that the insurer consented to the breaking up of the voyage. *ib.*
10. Where a vessel, insured from *New-York to Bourdeaux*, had *French* passengers on board, and the owners instructed the master to go to sea through the *Sound*, in order to avoid the chance of detention by *British* cruisers then off the *Hook*, and the master, accordingly, went through the *Sound*, instead of going through the *Narrows* to the *Hook*, which is the most usual and least dangerous route to sea, it was held not to be a deviation. *Reade and Jephson v. The Commercial Insurance Company*, 352
11. A vessel was insured from *New-York to Bourdeaux*, and consigned, with a part of her cargo, belonging to the owner, to a person at *Bourdeaux*, on whom the owner had drawn bills, to the full amount of the goods and freight; and the master applied to the consignee for

money to make the necessary repairs to enable the vessel to return to *New-York*, and the consignee advanced the money, and took a *bottomry bond* for the amount, with marine interest; it was held, that the insurers, under the circumstances of the case, were not bound to pay the *bottomry bond*, but only for the expense of repairs. *Reade and Jephson v. The Commercial Insurance Company*, 352

INTEREST OF MONEY.

If a person accepts the principal of his debt, he cannot, afterwards, bring an action for the interest. *Tillotson v. Preston*, 229

JUSTICE AND JUSTICE'S COURT.

1. Where the defendant, who was sued before a justice, on a note, and neglected to set off a demand for damages, for the breach of an agreement, though he had not then paid or suffered any actual damages, but the agreement was broken, it was held, that he could not, afterwards, (having been obliged to pay a certain sum by way of damages, in consequence of the plaintiff's non-performance of his agreement,) sue for, or recover the damages for the breach of the agreement. *M'Kerras v. Gardner*, 137
2. This court may order a justice to return the evidence in a cause before him, and if it does not appear sufficient to support the action, the judgment will be reversed. *Dodge v. Coddington*, 146
3. Where the defendant endorsed on a warrant, a written request to the justice, to enter judgment against him for whatever was the plaintiff's demand, shown to the satisfaction of the justice, and on the next day

- desired the justice not to enter up the judgment, as he had since discovered that the plaintiff demanded more than was due to him: it was held, that such a consent or request was revocable, and that the justice should not, after such revocation, have entered up the judgment, but have awarded a trial to ascertain the amount. *Gale v. Chase*, 147
4. In a suit before a justice, for money had and received, the defendant admitted that he had received the money, but said it was due to him, and the justice, thereupon, gave a judgment for the plaintiff; and it was held to be erroneous, for the whole declaration must be taken together, and was substantially a denial of the plaintiff's demand. *Carver v. Tracy*, 427
 5. In a suit, before a justice, against a tavern-keeper, for not entertaining the plaintiff, the defendant pleaded not guilty, and set off a trespass by the plaintiff, in his house, &c., and the jury found a verdict for the plaintiff, for six cents damages, and six cents costs; it was held, that the matter alleged, by way of set-off, was to be taken as a justification, under the general issue, for not entertaining the plaintiff, and the verdict, as a general verdict for the defendant, rejecting the six cents damages and costs. *Goode-now v. Travis*, 427
 6. In suits before justices of the peace, the defendant must set off his demand against the plaintiff, the first opportunity he has for that purpose, or he will be precluded afterwards. *Serjeant v. Holmes*, 428
 7. Thus, where two suits by the same plaintiff, against the same defendant, were pending at the same time, before the same justice, and the defendant suffered judgment to pass against him, by default, in the first suit, and then set off his demand against the plaintiff in the second suit; it was held, that it should have been made in the first suit, and that it was too late to be allowed in the second suit. *Serjeant v. Holmes*, 428
 8. In an action of debt before a justice, on a judgment obtained before another justice, a certificate, under the hand and seal of the justice, whose hand-writing was proved by the witness, was held not to be sufficient evidence, on a plea of *nul tiel record*. The certificate should be proved by the justice himself, or a sworn copy of his minutes be produced. *M'Carty v. Sherman*, 429
 9. Where no objection is made to the form of the oath, administered by the justice, at the time of trial, it cannot, afterwards, be alleged for error. *Brownell v. Slocum*, 430
 10. Where a cause has once been submitted to a jury, by a justice, he cannot, afterwards, take it from the jury, and nonsuit the plaintiff. *Young v. Hubbell and Root*, *ib.*
 11. In an action of *assumpsit*, before a justice, the defendant pleaded *non-assumpsit*, and set off five dollars for a trespass; the plaintiff did not object to the set-off; and the jury found a verdict for the defendant, for 15 dollars; it was held, that as the plaintiff did not, at the time, object to the set-off, he could not, afterwards, allege it for error. *Wilson v. Larmouth*, 433
 12. Though it would be error in form, if a jury should find more damages for a plaintiff, than he had alleged in his declaration; yet, the jury being judges of the damages of the trespass, set off by the defendant, the verdict will not be set aside, because the jury found more damages than the defendant alleged, it not being error in substance. *ib.*
 13. A constable who suffers an execution to sleep in his hands, and then pays the money to the plaintiff, without any previous demand on the defendant, and without his request, cannot maintain an action against the defendant, for the

- amount paid to the plaintiff on the execution. *Jones v. Wilson*, 434
14. Where the evidence given at the trial of a cause, before a justice, is set forth in the return to a *certiorari*, the court will decide, whether it was sufficient to support the plaintiff's declaration, and if they consider it insufficient, the judgment below will be reversed; but if the evidence is not stated in the return, the court will presume, that it was sufficient to support the declaration. *Kidder v. Townsend*, 435
 15. Where a justice has once adjourned a cause, for three months, at the request of a party, he cannot grant a second adjournment, at the request of the same party. *Townsend v. Lee*, 435
 16. In actions before justices, the jury may decide both the law and the fact. *M. Niel v. Scofield*, 436
 17. Where the defendant, at the time, makes no objection to the form of the plaintiff's declaration, he cannot, afterwards, avail himself of any defects which may appear in it, on the return to the *certiorari*. *ib.*
 18. The court, as to the proceedings before justices of the peace, will look to the right and justice of the case, without regard to matters of form, or technical niceties. *ib.*
 19. If the plaintiff declares in *assumpsit*, and also for a *fraud*, the defendant cannot object to the declaration, on the return to a *certiorari*, where he made no objection before the justice. *ib.*
 20. In an action before a justice, the defendant pleaded infancy, and the justice, from inspection, was of opinion that he was not an infant, and did not appoint a guardian, and the jury found that the defendant was not an infant. On the return to the *certiorari*, it was held, that the infancy of the defendant could not be assigned for error, against the record, and the fact, as found by the jury. *Ingersoll v. Wilson*, 437
 21. Where a justice returned to a *certiorari*, that, being convinced by the evidence adduced, he gave judgment," &c., the court intended that it was legal evidence. *Wilson v. Fenner*, 439
 22. Proceedings under the 11th section of the act to regulate highways, are to be summary. The justice, in issuing the warrant, acts *ministerially*, and is not bound to give notice of the complaint to the party, or to summon him to appear, or show cause against the charge. *Bouton v. Neilson*, 474

K.

KAYADEROSSERAS PATENT

1. A., as the owner of land situated in the patent of *Van Shaick*, permitted B., in 1791, to occupy it, for which B. paid him rent. Disputes having arisen between the proprietors under *Van Shaick's* patent, and those under the *Kayaderosseras* patent, an act of the legislature was passed the 11th *March*, 1793, (on the petition of various persons claiming under the two patents,) appointing commissioners to settle the boundaries between the two patents; and by the award of the commissioners, the land of A. was determined to be within the patent of *Kayaderosseras*. On this A. said he gave up all title to the land, and B., with the knowledge of A., purchased the land of the proprietors, under the *Kayaderosseras* patent. Ten years after, during which time he claimed no rent, A. brought an action of ejectment against B. for the land, and it was held, that he could not recover, on the ground of the prior tenancy of

- B., but must prove his title. *Jackson, ex dem. Waldron, v. Welden*, 283
2. Whether the award of the commissioners, under the act, was conclusive as to the title of A.? *Quere*, *ib.*

I..

LEGACY.

Where land is devised, subject to the payment of a specific sum of money, as a legacy, no action will lie against the personal representatives of the devisee, but it must be brought against the heirs and tenants. *Livingston v. Executors of Livingston*, 189

LESSOR AND LESSEE.

A lessor cannot maintain trespass *quare clausum fregit*, against a sub-tenant at will of the lessee, for taking down and carrying away the house erected by him on the demised premises, during the lease. *Tobey v. Webster*, 468

LIBEL.

1. On a motion to set aside the assessment of damages, on a judgment by default, in an action for a libel, it was held, that by the interlocutory judgment, the fact of the publication of the libel and the truth of the *innuendoes* were admitted; and that the defendant, before the jury of inquiry, is not to be allowed to call their attention to the other paragraphs contained in the same publication, in order to show a different meaning of the words
- 488

complained of, than that set up by the plaintiff. *Tillotson v. Cheetham*, 56

2. The defendant, in an action for a libel, is not allowed to give in evidence, in mitigation of damages, a former recovery of damages against him, in favor of the same plaintiff, in another action for a libel, which formed one of a series of numbers published in the same gazette, and contained the libellous words charged in the declaration in the second suit. *ib.*
3. In an action for a libel, the defendant pleaded not guilty, and gave notice of certain facts to be proved at the trial; and, afterwards, applied for leave to strike out the notice, but the court refused to grant the motion, unless he would make affidavit of the falsehood of the matters stated in the notice. *Clinton v. Mitchell*, 144

LIMITATIONS, STATUTE OF.

1. In actions brought in this state, the defendant may set off demands against the plaintiff, which arose when both parties resided in another state, and which, if sued for there, would be barred by the statute of limitations of that state, provided six years have not elapsed since the plaintiff came to reside in this state. *Ruggles v. Keeler*, 263
2. Courts in this state, in actions on foreign contracts, are not governed by the statutes of limitations in other states, where such contracts were made. *ib.*
3. The *saving* in the statute of limitations of this state, extends to foreigners or those who have resided altogether out of the state, as well as to citizens of this state, who may be absent for a time. *ib.*
4. Goods were taken on an execution, which was, afterwards, set aside for *irregularity*. An action was

brought, and the defendant pleaded the statute of limitations. It was held, that the execution, being irregular, was a nullity, and that the time when the statute began to operate, was from the first taking of the goods, and not from the time when the execution was set aside. *Read v. Markle*, 523

M.

MESNE PROFITS

See EJECTMENT, 13.

N.

NEW TRIAL.

1. On a motion for a new trial, the defendant cannot object to the form of the action. *Smith v. Elder*, 105
 2. Where there was doubtful or contradictory evidence, whether the sale of a chattel was absolute, or not, the court refused to set aside the verdict of a jury. *De Foncleare v. Shottenkirk*, 170
 3. In actions of a penal or vindictive nature, the court will not grant a new trial, merely because the verdict is against the weight of evidence, unless some rule of law has been violated. *Jarvis v. Hatheway*, 180
 4. In an action of assault and battery, where the injury was trifling, and the jury found a verdict for the defendant, a new trial was refused, notwithstanding the misdirection of the judge. *Hyatt v. Wood*, 239
 5. If the jury take a paper out with them when they deliberate on their
- VOL. III. 62

- verdict, but never look at it, the verdict will not be set aside on that account. *Hackley v. Hastie*, 252
6. A verdict will not be set aside on the ground of newly discovered evidence, merely to give the party an opportunity to impeach the credit of the witnesses sworn at the trial. *Bunn, Survivor, &c., v. Hoyt, Survivor, &c.*, 255
 7. Where there is evidence on both sides, and the jury are not misdirected, on a question of *fraud*, the court will not set aside their verdict, fraud being a question of fact for the decision of the jury. *Ward v. Center*, 271
 8. Where the cause of action is trifling, and the plaintiff recovers only nominal damages, the court will not set aside the verdict for the misdirection of the judge, if the plaintiff will elect to discontinue without costs. *Fleming v. Gilbert*, 528

O.

ONONDAGA COMMISSIONERS

If a party conceiving himself aggrieved by the award of the *Onondaga Commissioners*, has given them notice of his dissent, within two years, it is sufficient to prevent his being concluded by the award, whether the commissioners have entered the dissent in their book of awards, or not: and what amounts to such notice is a question of fact for the jury to decide. *Jackson, ex dem. Reiley and others, v. Livingston*, 455

ORDER OF BASTARDY.

1. An order of bastardy, made by two justices of the peace, pursuant to the statute, is *prima facie* evidence
- 489

- of the truth of the facts therein stated, it being considered as a judgment of the magistrates. *Sweet v. Overseers of the Poor of Clinton*, 23
2. If a party appeal from an order of bastardy made by two justices, according to the statute, it is incumbent on him to impeach the truth of the facts stated in the order. *ib.*

See SETTLEMENT OF THE POOR.

ORDER FOR THE PAYMENT OF MONEY.

Where M. and S., being in embarrassed circumstances, drew an order on one F., their agent, directing him to pay to R. such moneys as should come into his hands from certain persons in *Europe*, from whom F. had been authorized to receive the amount of certain policies of insurance, which order F. accepted on the same day, "to pay the moneys as soon as they came into his hands." In an action brought by the assignees of M. and S., who soon after became bankrupts, it was held, that the order and acceptance amounted to an assignment, and fixed the fund irrevocably for the benefit of R. *M Menomy and Townsend, Assignees, &c., v. Ferrers*, 86

P.

PARTIES IN CHANCERY.

Where a party to a cause in the Court of Chancery becomes insolvent, pending the suit, his assignees must be made parties, before the cause can be heard. *Deas v. Thorne and others*, 543

490

PARTITION.

1. Where a partition had been made by the proprietors of a patent, and a survey and map of the patent made for them, and possession was taken by the several proprietors according to such survey, it was held, that after the lapse of 40 years, the parties were concluded from contesting, with each other, the correctness of the actual locations. *Jackson, ex dem. Schuyler and others, v. Vedder*, 8
2. A partition deed operates as an estoppel as to the parties and all claiming under them: so that, where a partition was made in 1747, and possession taken by the parties according to the survey and map, then made, it was held conclusive, though, by a second survey, in 1801, it was found that there was a mistake in the first survey, on which the petition was founded. *Jackson, ex dem. Ostlander, v. Hasbrouck*, 331
3. Where one of several tenants in common had aliened his share, and the plaintiff in partition proceeded, as if no such alienation had been made, by giving notice to the original co-tenant, without taking notice of his grantee, the judgment in partition was held to be void. *Jackson, ex dem. Antell and Wife, v. Brown*, 456

See SURVEY OF LAND.

PARTNERSHIP.

1. If one of several co-partners executes a deed of release, under his hand and seal, of a debt due to the co-partnership, it is binding on all the co-partners. *Pierson v. Hooker*, 68
2. If one of two partners makes a special warranty on the sale of goods, the purchaser may maintain an action against the party who made the warranty, without joining

the other partner. *Clark v. Holmes*,
148

1. If one partner, who is authorized to adjust the debts due from the co-partnership, after its dissolution, adjusts an account, and acknowledges a balance to be due from the co-partnership, this acknowledgment will not bind his co-partner. *Hackley v. Patrick*, 536

PASSAGE MONEY.

See FREIGHT, 3.

PATENT.

1. The possession of lands by native *Indians* does not affect the validity of a patent from the state, granting the land to certain persons, without the consent of the *Indians*. *Jackson, ex dem. Klock, v. Hudson*, 373
2. The legality of such a patent is a political question, which cannot arise or be discussed between two private citizens of the state. *ib.*

PLEAS AND PLEADINGS.

- Where a declaration, in a suit for a libel, was entitled of *November* term, generally, but the *memorandum* was of the second *Monday*, or the 14th of *November*, being the first day of the term, and the libel was alleged to have been published on the 18th of the same *November*, it was held, on demurrer, to be bad, and that such a mistake would not have been cured by a verdict. *Cheetham v. Lewis*, 42
1. In an action of *assumpsit*, the declaration stated, that the plaintiff and U. and W. were joint owners of a certain vessel and her cargo, then on a distant voyage, and were jointly interested in her earnings and the profits of the voyage, of

which vessel W. was also master, and died during the voyage, and that, after his death, the defendant, B., in consideration, that the plaintiff had undertaken and promised to the defendant, that the defendant should receive from the plaintiff the effects of W. in the vessel, and her earnings, in like manner as W. was entitled to receive them, according to the agreement between the owners, and in consideration that the plaintiff had agreed with the defendant, to account to him for the said vessel, her earnings, profits, &c., in like manner as he was bound to do to W., he, the defendant, undertook and promised to pay to the plaintiff, any demands or sums of money, due and owing from W. to the plaintiff, at the time of W.'s death, and also any demands which the plaintiff had against the share of W. in the vessel; and the plaintiff set forth in his declaration, a certain debt due to him from W., and averred, that he, the plaintiff, was always ready to perform his part of the agreement, &c. On a demurrer, this declaration was held bad, as it did not set forth a sufficient *consideration* for the promise of the defendant. *Powell v. Brown*, 100

3. In an action on a promissory note to pay money when collected, &c., the plaintiff must *allege* and prove that the money was collected, in order to recover on the promise. *Dodge v. Coddington*, 146
4. In an action by the holder of a bill of exchange, protested for non-payment against the drawer, after setting forth the presentment and protests, &c., in the declaration, a general averment of notice, "of all the premises," is sufficient. *Boot and Bentley v. Franklin*, 207
5. Where a declaration was of *November* term, 1806, and there was an imparlance over to *February* term, 1807, when the defendant pleaded, that on the 7th *January*, 1807, he

- paid the plaintiff several sums of money, &c., the plea was held good, without saying that he paid the interest and costs which had accrued. *Tillotson v. Preston*, 229
- 6 A plea *puis darrein continuance*, of a discharge under the insolvent act, stating generally, that the defendant, being an insolvent debtor, and having, in all things, conformed to the directions of the act, in pursuance thereof, on such a day, obtained his discharge, &c., is bad. The discharge, at least, ought to be set forth in the plea. *Cruger v. Cropsey*, 242
- 7 Pleading the general issue with another plea, that another action was pending for the same cause, though put in the form of a plea in bar, is not pleading *issuably*, according to the meaning of the condition annexed to a rule granted, on pleading *issuably*. *Davis v. Grainger*, 259
- 8 To a plea of a discharge under the insolvent act, the plaintiff replied, that the defendant had procured a creditor to sign his petition, and to make affidavit for a larger sum than was really due to him; and that he had concealed a debt due to him, which he did not insert in his inventory; and also that he had been guilty of perjury. On a demurrer, the replication was held bad, as containing three distinct and independent grounds for avoiding the discharge, which would require several and distinct points to be put in issue. *Cooper v. Hermance*, 315
- 9 In an action of covenant for a breach of the covenant of seisin, &c., contained in a deed, the defendant pleaded, 1. "That the plaintiff, after the deed to him, in consideration of 1,000 dollars, sold, released and quitclaimed all his right and title to the land to the defendant," &c. 2. "That before the plaintiff had sustained any damage by a breach of the covenants in the deed to him, he sold and released all his right, title and interest in the land to the defendant." 3. "That, in consideration of 1,000 dollars paid to him, the plaintiff agreed to give up the deed to the defendant." The defendant demurred to the 1st and 3d pleas, and replied to the 2d plea, that the plaintiff had sustained damages before the release, by reason of the breach of the covenant of seisin, to wit, by paying to the plaintiff 1,408 dollars for the land, when the defendant was not, in fact, seised," &c., and tendered issue thereon. To this replication the defendant demurred specially: It was held, that the subsequent reconveyance of the land to the defendant, was not an extinguishment of the covenants in the deed to the plaintiff; that the 1st and 3d pleas were bad; and that, though the replication to the 2d plea was also bad, yet the plaintiff was entitled to judgment on the demurrer. *Bennett and Wife v. Irwin*, 363
- 10 In an action of debt, on an arbitration bond, the defendant pleaded no award; the plaintiff replied, setting forth the award, and the defendant rejoined that the award was not *final*, &c. On demurrer, it was held that the rejoinder was a departure from the plea, and therefore bad. *Barlow v. Todd*, 367
- 11 Where an award, on the face of it is final, nothing *dehors* the award can be pleaded, or given in evidence against it. *ib.*
- 12 In an action for a penalty under the 35th section of the act "to regulate highways," the plaintiff need not negative the *proviso*, in his declaration. *Bennett v. Hurd*, 438

POINTS.

See PRACTICE, 55.

PRACTICE

1. To bring a person into contempt

- for disobeying a judge's order, it must have been served by showing the original order at the same time the copy was served. *Howland v. Ralph*, 20
2. In order to bring a party into contempt, for the non-payment of costs, the person serving the taxed bill, &c., must show to the party his authority to receive the costs. *Jackson, ex dem. Lawe, v. Virgil*, 138
 3. Where a judgment was entered up, by warrant of attorney, on a bond alleged to be given for a usurious consideration, a *feigned issue* was awarded to try the fact of usury, and execution was stayed, until after the trial. *Starr v. Schuyler*, 139
 4. An inquest taken by default was set aside, on the affidavit of the attorney of the defendant, that from the representations made to him by the defendant, and from the paper he had examined, he verily believed that the defendant had a legal defence. *Philips v. Blagge*, 141
 5. Counter affidavits are not allowed to be read in opposition to such a motion. *ib.*
 6. On an affidavit that the bond and warrant of attorney, on which a judgment had been entered up, were *forged*, the court awarded a *feigned issue* to try the fact of forgery. *King v. Shaw*, 142
 7. A warrant of attorney given in vacation, to enter up judgment, on a bond payable immediately, in term, or vacation, will include the vacation in which the bond was given, and a judgment entered up in the same vacation, as of the preceding term, was held to be regular. *ib.*
 8. A motion to set aside the report of referees, on the merits, is a non-enumerated motion. *Clinton v. Elmendorf*, 143
 9. Where the defendant, in an action for a *libel*, pleaded not guilty, and gave notice of certain facts, to be given in evidence at the trial, and afterwards moved for leave to strike out the notice, the court refused to grant the motion, unless he would make affidavit of the falsehood of the matters stated in the notice. *Clinton v. Mitchell*, 144
 10. The affidavit, on which a motion is made to remove a cause into the Circuit Court of the United States, must expressly state that one of the parties is a *citizen of another state*. *Corp v. Vermilye*, 145
 11. Rules by consent, or agreements between parties or their attorneys, are not binding, unless entered in the book of common rules, or reduced to writing by them, or by some person authorized for that purpose. *Dubois v. Roosa*, 145
 12. Where the attorney of one of the parties resided out of the city of *New-York*, but within 40 miles, and had an agent in the city, service of a notice in the cause on such agent, in vacation, was held not to be sufficient. *Hunt v. Onderdonk*, 149
 13. After a judgment by default, the court may assess the damages without the intervention of a jury. *M'Collum v. Barker*, 153
 14. Where there were several counts in a declaration, and after interlocutory judgment, damages were assessed upon each, and judgment arrested on the first count, no objection being made to the others, the plaintiff was allowed to enter a *nolle prosequi* on the first count, and take judgment on the others. *Livingston v. Livingston*, 189
 15. Where a motion is made to set aside an inquest taken by default, the affidavit must state, that an inquest was taken, *by default*, in the cause. *Fink v. Bryden*, 241
 16. Where an attorney misapprehends the rule of practice, the court will permit him to give new notice of a motion for a subsequent day in term, on new affidavits. *ib.*
 17. Where the defendant, on an affidavit of merits, moved to set aside an inquest taken by default, and stated

- also that the verdict was taken for more than was due, and the opposite party offered to relinquish the surplus, the court refused the motion, but gave the defendant until a subsequent day in term to produce a further affidavit, in explanation of the former. *Fink, jun. v. Bryden*, 245
- 18 There need not be 8 days between the *teste* and return of a *ca. sa.* to charge bail, where the proceedings are not by original writ. *Carmcr v. Weeks and another*, 246
- 19 When the defendant pleads payment, and gives notice of a *set-off*, in general terms, for goods sold and delivered, money paid, &c., the plaintiff may require him to specify and deliver an account of the *particulars* of the *set-off*. *Mercer v. Sayre*, 248
20. In like manner, where the particulars of the plaintiff's demand are not set forth in the declaration, the defendant may require him to deliver an account of the particulars. *ib.*
21. Counter affidavits may be read as to the sufficiency of an excuse, for not giving notice of a motion for the first day of the term. *Quin v. Riley*, 249
22. Where an executor or administrator brings a wrong action, by mistake, he will be allowed to discontinue without costs. *Phœnix, Administrator, v. Hill*, 249
23. An issue to try the fact of usury, on a judgment, will not be awarded, unless the usury be denied, or the fact be put in doubt. *Hewit v. Fitch*, 250
24. Where the copy of the declaration and notice of rule to plead are served upon the defendant personally, and he afterwards employs an attorney, who gives notice of his retainer, the declaration and rule to plead need not be served *de novo*, on the attorney; but he must put in his plea in 20 days after service of the first notice. *Kleecke v. Styles*, 250
25. Objections to commissioners named to take the examination of witnesses abroad will not be received upon mere suggestion; but there must be an affidavit of the grounds of objection. *Biays v. Merrihew*, 251
26. If the jury take a paper out with them when they deliberate on their verdict, but never look at it, the verdict will not be set aside on that account. *Hackley v. Hastie*, 252
27. On a motion to set aside an inquest by default, against two defendants, one having previously been discharged as an insolvent, the court refused the rule, upon the plaintiff's stipulating to enter a verdict for the defendant who was discharged, &c. *Oakley v. Steddiford and Marschalk*, 253
28. Where a judge's order has been obtained to stay proceedings on a verdict, the party in whose favor the verdict was given may, nevertheless, enter a rule *nisi* for judgment, on the fourth day of the next term. *Hackley v. Hastie and Patrick, ib.*
29. Where there was a special count and several money counts in a declaration, and after interlocutory judgment for want of a plea, damages were separately assessed on each count, and judgment was, afterwards, arrested on the first count, the inquisition, &c. on the other counts was set aside, and the defendant allowed to plead on terms. *Livingston v. Executors of Livingston*, 254
30. Where a jury deliver a sealed verdict to the court, and, on being *polled*, one of the jurors disagrees to the verdict, the judge may send the jury out again to agree on their verdict. *Bunn, Survivor, &c., v. Hoyt, Survivor, &c.*, 255
31. Where a writ was served on *Sunday*, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded, and obtained a judgment by default against the defendant and issued execution, the court set aside all the proceedings, on condition that

- no action should be brought against the sheriff for a false imprisonment. *Rob and Neilson v. Moffatt*, 257
32. An affidavit of the defendant's attorney, "that he was informed and verily believed that the defendant had a substantial defence on the merits," is not sufficient to set aside a default, entered in the cause. *Briggs v. Administrator of Briggs*, 258
33. A rule for a commission to examine witnesses abroad is not granted until after issue is joined in the cause. *Jackson, ex dem. Aikins, v. Bankcraft*, 259
34. Where the names of persons who are dead, are inserted as lessors of the plaintiff, in an action of ejectment, the court will order them to be struck out of the declaration. *ib.*
35. Where a rule had been granted upon condition of pleading *issuably*, and the defendant pleaded the general issue, and also that another action for the same cause had been previously commenced by the plaintiff and was pending, the second plea, though in the form of a plea in bar, was held to be a plea in abatement, and so far vitiated the first plea, as not to be a fulfilment of the condition of the rule. *Davis v. Grainger*, 259
36. Where referees appointed by the court refuse to make a report, the proper course is to proceed by attachment against them. *Thompson and Coles v. Parker*, 260
37. Service of a notice on *Thursday*, of an intended motion on *Monday* following, is sufficient. *Charles v. Stansbury*, 261
38. The party demurring must make up the paper books, and bring on the cause to argument. *Littlefield v. Story*, 425
39. In every case of the service of a notice, except it be to bring a party into contempt, the leaving the notice at the dwelling-house of the party is sufficient, and is equivalent to a personal service. *Johnston v. Robbins*, 440
40. The rule adopted, in regard to causes to be brought to trial at the sittings, in the city of *New-York*, that if it is made to appear that the cause could not have been tried, had it been noticed, shall excuse the plaintiff from stipulating to bring it to trial at the next court or be nonsuited, does not apply to causes to be tried at the country circuits. *Ross v. Vaughan*, 442
41. In an action against a *sheriff*, where, on a motion for a nonsuit, the plaintiff stipulates to try the cause at the next circuit, or be nonsuited, he is not bound to pay *double costs*. *Talcot v. Woodruff*, 443
42. On the return of a writ of error from a court of common pleas to this court, the record itself is removed, and this court, on a reversal of the judgment below, may award a *venire de novo*, returnable at a circuit or sittings. But where it appeared that the sum demanded was so small, that the plaintiff, if he recovered, would be obliged to pay costs, the court refused to grant a *venire de novo*. *Brown v. Clark, ib.*
43. Where the defendant in a cause has enlisted as a *soldier* in the army of the *United States*, the court will not grant leave to discontinue, without paying costs, if it appears that the sum to be recovered is more than 20 dollars. *Reynolds v. Lammond*, 445
44. On a motion for a judgment as in case of nonsuit, for not proceeding to trial in the cause, the affidavit must state in what county the *venue* is laid. *Walsh v. Hill, jun.*, 446
45. Where the defendant, having been surrendered by his bail, and lain more than three months in prison without being charged in execution, obtains a rule to show cause why a *supersedeas* should not be awarded, if the plaintiff, after service of the rule, and before the time to show

- cause, issues an execution to charge the defendant, he may show that for cause, and it will be sufficient to prevent a *supersedeas*. *Minturn and Champlin v. Phelps*, *ib.*
46. The defendant may move to change the *venue*, after issue joined, and at any time where there has been no loss of trial, and no delay will be produced. *Kent v. Dodge*, 447
47. On a motion to set aside proceedings in a bail-bond suit, for irregularity, the affidavit is well entitled in the bail-bond suit. *Pell v. Jadwin*, 448
48. On a motion to set aside an inquest, taken by default, an affidavit that the defendant had a good and substantial defence in the cause, was held to be a sufficient affidavit of merits. *Briggs v. Briggs*, 449
49. An order to stay proceedings in a cause, and a certificate of probable cause, are the same in effect, and require the same practice as to service of notice of motion, and copies of affidavits, in order to prevent further proceedings. *Bailey v. Voorhees and Caldwell*, 451
50. Before a suit can be commenced against bail, a *ca. sa.* or *test. ca. sa.* against the principal, must be *actually* returned, with *non est inventus* endorsed thereon, and filed in the clerk's office. *Pearsall v. Lawrence and Doe*, 514
51. In an action, not bailable, or where no *ac etiam* clause is inserted in the writ, any number of defendants may be joined in one writ, and the plaintiff may, afterwards, declare against those brought into court, severally, or against some, omitting others. *Montgomery v. Hasbrouck and others*, 538
52. If an affidavit begins with the deponent's name, without being subscribed by him, it is sufficient. *Jackson, ex dem. Kenyon, v. Virgil*, 540
53. Where a new trial has been granted, and the plaintiff does not bring on the cause, pursuant to notice, judgment as in case of nonsuit will be granted, unless the plaintiff stipulates to try the cause at the next circuit, or be nonsuited. *Jackson, ex dem. Ludlow, v. Meyers*, 541
54. Where a plea is put in, which the plaintiff considers as frivolous or a nullity, he may either enter a default, for want of a plea, or demur, but must not apply to the court for judgment by default. *Falls v. Sickney*, *ib.*
55. In every case made for argument, the party who is to open the argument must first deliver to the court and the opposite party the *points* he means to insist on. *Main v. Newson*, 542
56. After judgment on a demurrer, it is too late, at the next term, to move for leave to withdraw the demurrer. *Currie and Whitney v. Henry*, 140

PRACTICE IN THE COURT OF ERRORS.

1. On an appeal from an order of the Court of Chancery, postponing the hearing of a cause, for want of proper parties, this court will not hear, nor decide on the merits of the cause. *Deas v. Thorne and others*, 549
2. On an appeal from an interlocutory order of the Court of Chancery, this court will not hear and decide on the merits of the cause, unless the merits have also been heard in the court below. *Deas v. Thorne and others*, 549
3. On an appeal, this court will not permit evidence to be read, which was not read in the court below. *ib.*
4. No costs are allowed the appellant in this court, on a reversal of the decree of the court below. *Farquharson v. Mabee*, 553
5. Where a writ of error was brought on a bill of exceptions from the Supreme Court, and the cause was

decided in favor of the plaintiff in error, and a *venire de novo* awarded, and on the new trial of the cause below, a second bill of exceptions was taken on the same point, and a second writ of error brought thereon, this court ordered the second writ of error to be quashed. *Hartshorne and others v. Slegt and Slegt*, 554

3. Where, on a petition of appeal, the appellant omitted to state the reasons of the appeal, and the respondent answered the petition, it was held that the respondent was too late, afterwards, to object to any defects in the petition in matters of form. *Rogers v. Cruger*, 564

7 No appeal lies from a temporary order of the Court of Chancery granting an injunction to stay the trial of a suit at law. *Trustees of Huntington and others v. Nicoll*, 566

8. On an appeal from an order of the Court of Chancery, granting an injunction to stay proceedings at law, this court will not hear or decide on the merits of the cause, if the merits have not been heard in the court below, before granting the order. *ib.*

9. No appeal lies from an order of the Court of Chancery, for the examination of the *guardians* of the complainant, who was an infant, as witnesses for him; such examinations being always taken, *de bene esse*, and saving all just exceptions; and, if inadmissible, on account of the incompetency of the witnesses, may be suppressed at the hearing before the chancellor; or, if admitted, and the witnesses are incompetent, it may then become the ground of appeal. *ib.*

REFERENCE AMONG CREDITORS.

See UNITED STATES. ABSENT DEBTORS. INSOLVENT DEBTORS.

PRISON-BREAKING.

If a prisoner confined in a county prison for *petit larceny*, break prison, it is a felony, for which he may be sentenced to the state prison for a period not exceeding 14 years. *People v. Duell*, 449

PUBLIC OFFICERS.

In the case of a public officer, as a sheriff, deputy sheriff, justice of the peace, constable, &c., it is sufficient to prove that he acted as a public officer, without producing his appointment. *Potter v. Luther*, 431

R.

RECEIPT.

P. gave the following receipt to a master of a vessel, for goods: "Received of Capt. Smith, 50 barrels of provisions, on account of *Daniel C M Instry*, 5th December, 1803." In an action brought by *M Instry* against P., for goods sold and delivered, it was held, that the receipt was not evidence of a sale of goods, nor that they were received on an account due from *M Instry*, but rather to sell on commissions, in the usual course of business, and that parol evidence was admissible to show that the goods were, in fact, so received, and so far to explain the written receipt. *M Instry v. Pearsall*, 319

REFEREE AND REFERENCE.

Where referees appointed by the court refuse to report, the proper course is to proceed by attachment against

them. *Thompson and Coles v. Parker*, 260

REGISTRY OF DEEDS.

See DEED.

RELEASE.

- 1 Where one of several partners executed a release of all demands, under his hand and seal, to a debtor of the copartnership, it was held to be binding on the co-partnership: and that parol evidence was inadmissible to show that a particular debt was not intended to be released. *Pierson v. Hooker*, 68
2. Where A. and B. being joint owners of a hogshead of rum, the sheriff, by virtue of an execution against B., seized the whole, and sold it to C., and A. brought an action of trover against C. for his share, it was held that a release of all actions from A. to the sheriff, was no bar to a suit against C., and that the sheriff was not a trespasser. *Wilson and Gibbs v. Reed*, 175

RENT.

In an action of *debt*, for *rent* due on the lease of a house, the destruction of the premises by fire was held to be no excuse to the lessee for not paying the rent according to his covenant. *Hallett v. Wylie*, 44

S.

SALE OF GOODS.

1. An entry made by the vendor of goods, in his book of sales, of the name of the purchaser and the

terms of the contract of sale, which was read to the agent of the vendor, and assented to by him as correct, was held not to be a sufficient memorandum in writing within the statute of frauds. *Bailey and Bogert v. Ogden*, 399

2. Whether the vendor is bound by such a memorandum, so that the vendee could enforce the contract against him. *Quere.* *ib.*
3. The form of the memorandum of the bargain is not material, but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without resorting to *parol* proof. *ib.*
4. An actual delivery of goods, or a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. *ib.*
5. Those circumstances which ought to be held tantamount to an actual delivery must, however, be so strong and unequivocal, as to leave no doubt of the intent of the parties. *ib.*
6. An agreement with the vendor about the storage of goods and the delivery of the export entry to the agent of the vendee, were held not to be sufficiently certain, to amount to a constructive delivery, or to afford an *indicium* of ownership. *ib.*
7. Where the vendor of goods on a credit required notes of the vendee with approved endorers, which was agreed to by the agent of the vendee as one of the terms of the contract of sale, *it seems* that the contract is not complete, until the vendee, or principal, has assented to the giving of the endorsed notes, and the endorers have been named and approved. *ib.*
8. Whether an agent, who is authorized to purchase goods, at a certain price, and upon certain terms, can stipulate, so as to bind his principal to give endorsed notes, or security. *Quere.* *ib.*

- 9 An agent or broker, authorized to purchase goods on certain terms, is a competent witness in a suit between the vendor and vendee, though he has exceeded his authority. *Bailey and Bogert v. Ogden*, 399

SCIRE FACIAS.

1. Where a judgment has lain more than a year, and the defendant, afterwards, consents that an execution be issued, without the judgment being revived by *scire facias*, the execution will not be set aside for irregularity, at the instance of a third person, who alleges, that the judgment has been kept on foot collusively, and the execution issued fraudulently, to injure him, but he must seek relief in the Court of Chancery, or by bringing the question of fact as to the fraud, to a trial, by an issue at law. *Howland v. Ralph*, 20
2. A *scire facias*, on a judgment against C., issued against A. and B., as tertenants of C., deceased, was returned by the sheriff, that he had given notice to the tenants of the land of which C. was seised, &c. to appear, &c. On the 5th May, 1807, a rule was entered for the tenants to appear; on the 9th May, their defaults were entered, and on the 15th May, 1807, a final judgment was entered for the plaintiff. It was held, that the tertenants were too late, after judgment by default, to move to set aside the proceedings on the *scire facias*, on the ground that the heirs and personal representatives of C. had not been warned, or because that they were not such tertenants as ought to have been summoned, especially, when no merits are disclosed by them, and the proceedings were regular. *Whitney v. Camp and Townly, Tertenants of Crosby, deceased*, 86

SEAMEN'S WAGES.

1. Where the crew of a vessel were permitted by the first mate, in the absence of the master, to go on shore, and the second mate was ordered to return and take care of the vessel at night, but neglected to do so, and some part of the cargo was stolen out of the vessel, it was held, that the crew were not liable to contribute out of their wages, to make good the loss. *Lewis v. Davis*, 17
2. It seems, that where the loss or embezzlement of goods can be traced to a particular seaman, the rest of the crew ought not to contribute. *ib.*
3. During a voyage from *Greenock* to *New-York*, a ship called the *Sarah* was, from necessity, abandoned by the crew, who took the boat, bringing away some part of the cargo; the boat, with the crew and the articles saved, were afterwards taken up at sea, by another vessel and brought to *New-York*, and the merchandise was libelled by the crew of the last vessel for *salvage*. In an action brought by the seamen of the *Sarah* against the master, for wages from *Greenock* to the time the ship was abandoned, it was held, that no freight was earned, and that they were not, therefore, entitled to wages; though they might have an equitable *lien* on the goods saved for a compensation, in the nature of *salvage*. *Dunnett v. Tomhagen*, 154
4. A seaman was hired for a voyage from *New-York* to *Bombay*, and from thence to *Canton* and back to *New-York*. The ship was laden with articles contraband of war, and while in the course of the voyage to *Bombay*, the master, under a pretence of a want of water, which was not true in fact, deviated, in order to put into the *Isle of France*, which was the real, but concealed, port of destination; and while pro-

ceeding in the rout to that island, and near it, was captured by a *British* cruiser, and afterwards condemned: the seaman was put on board an *English* frigate, and, afterwards, shipped to *London*, from whence he sailed to *Wilmington, N. C.*, and from thence came to *New-York*. In an action brought by him against the owner of the ship, for wages, it was held, that he was entitled to his wages, according to the contract, from the time he left *New-York*, until his return there again, deducting such wages as he had earned and received during his absence. *Hoyt v. Wild-fire*, 518

SETTLEMENT OF THE POOR.

1. S. W. was born in the state of *Connecticut*, where she had a legal settlement, and on the 1st *May*, 1801, came to reside in the city of *New-York*, where she continued to reside in the capacity of a servant, until the 19th *January*, 1804, when she was delivered of a bastard child. She had not been bound as an apprentice, or servant, to any person. The overseers of the poor of the city of *New-York* granted an order, charging the reputed father of the child with its maintenance, which order was confirmed by the *General Sessions*. It was held, that the mother had no legal settlement in *New-York*, and that it was competent to the justices to grant the order of filiation. *Wynkoop v. Overseers of the Poor of the City of New-York*, 15
2. *It seems*, that where the mother of a bastard child had no legal settlement, the child acquires a settlement *by birth*, in the place where it is born. *ib*
3. Where a town is divided, by an act of the legislature, into two towns, and the poor are also to be divided between the two, those who, after-

wards, become paupers, are to be considered as settled in the town, within which they were respectively born, and not where they happened to reside at the time of the division. *Overseers of Washington v. Overseers of Stanford*, 193

SET-OFF.

1. Where there were three suits between the same parties, and the plaintiff recovered against the defendant in two of them, and the defendant against the plaintiff in the other, the damages recovered in the last suit were allowed to be set off against the two other suits, but not against the costs. *Devoy v. Boyer*, 247
2. Where the defendant pleads payment, and gives notice of a set-off, in general terms, for goods sold and delivered, money paid, &c., the plaintiff may require him to specify and deliver the *particulars* of the set-off. *Mercer v. Sayre*, 248
3. In an action of *assumpsit*, brought in this state, the defendant may set off demands against the plaintiff arising, when both parties resided in another state, and which, if sued for there, would be barred by the statute of limitations of that state, provided six years have not elapsed since the plaintiff came into this state. *Ruggles v. Keeler*, 263

SLANDER.

If words, actionable in themselves, be spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice or not. *Jarvis v. Hathe-way*, 180

SOLDIER.

1. Where the defendant in a cause has enlisted as a soldier in the army of the *United States*, the court will not grant leave to discontinue, without paying costs, if it appear that the sum to be recovered is more than 20 dollars. *Reynolds v. Lammond*, 445
2. Where a person obtained a judgment before a justice of the peace for 11 dollars, and enlisted as a soldier in the army of the *United States*, and the judgment was, afterwards, reversed in this court, with costs amounting to more than 20 dollars, it was held, that the costs referred back to the original judgment, and that the defendant in error was not entitled to be discharged from an execution issued for the costs, on the judgment of reversal. *Reynolds v. Lammond*, 540

STAGE WAGONS.

See ACT TO GRANT TO *Terence Donnelly*
AND SIX OTHERS, &c.

STONE ARABIA PATENT.

- Lot No. 50, in the second allotment of *Stone Arabia Patent*, is to be held according to the survey of the patent, made by *Henry Frey*, in 1754, and as designated and described by that survey. *Jackson, ex dem. Casselman, v. Lepper and Dillenback*, 12

SURVEY OF LAND.

1. Where a location is made under a deed of partition and survey, and an undisturbed possession held according to such location, for 38 years, it shall avail, and be conclu-

sive, though, by a subsequent survey it should appear that such location was not accurately made. *Jackson, ex dem. Wright and others, v. Diefendorf and Zoller*, 269

2. Where the proprietors of a tract of land made partition of it, in 1747, agreeably to a survey thereof made for that purpose by their request, and released to each other their respective shares, according to the map and survey, and possession was, afterwards, taken and held agreeably to such survey, for above 20 years, it was held, that persons holding under the proprietors were concluded by such survey and partition, although it should appear, by a subsequent survey, in 1801, that there was a mistake in the first survey, on which the partition was made, unless it should be proved that the proprietors had, afterwards, agreed to correct the mistake, and alter the boundary lines. *Jackson, ex dem. Ostrander, v. Hasbrouck*, 331

T.

TERTENANT.

See SCIRE FACIAS, 2.

TRESPASS.

Where the owner of lands agrees with another that he may sow the land on shares, they may maintain a joint action of trespass against a third person who cuts and carries away the corn. *Foot and Litchfield v. Colvin and others*, 216

TRESPASS *quare clausum fregit*.

A lessor cannot maintain an action of trespass *quare clausum fregit* against
501

a sub-tenant at will of the lessee,
for taking down and carrying away
a house, erected by him on the
demised premises, during the lease.
Tobey v. Webster, 468

TROVER.

- 1 A. and B. being joint-owners of a hogshead of rum, the sheriff, by an execution against B., seized the whole, and sold it to C., who, afterwards, sold it by retail. In an action of *trover*, brought by A. against C. for his part of the rum, it was held, that if one tenant in common of a chattel sell it, *trover* will lie against him by the other co-tenant. *Wilson and Gibbs v. Reed*, 175
- 2 Where goods were taken on an execution, which was, afterwards, set aside for irregularity, the execution being a nullity, an action was held to lie on the first taking. *Read v. Markle*, 523
3. Trover or detinue will lie for a promissory note in the hands of a third person. *Todd v. Crookshanks*, 432
4. Trover will not lie against the payee of a promissory note, for the note, by the maker, after he has paid it. *ib*

TRUST.

If A. buys land with the money of B., and takes a conveyance to himself, he is a trustee for B., and an implied or resulting trust is not within the statute of frauds, but may be proved by parol; and the land may be seized and sold under an execution against B., the *cestui que trust*. *Foot and Litchfield v. Colvin and others*, 216

TRUSTEES OF NEWBURGH.

See CORPORATION EJECTMENT.
502

U.

UNITED STATES.

1. To entitle the *United States* to a preference over other creditors, it must be shown that the debtor was insolvent, and had voluntarily assigned *all* his property for the benefit of his creditors, or that an attachment had been taken out against his property, as an absent or absconding debtor, and prosecuted to effect. *M'Lean v. Rankin and Heyer*, 369
2. If an attachment be taken out against a person as an absent or absconding debtor, and, afterwards, withdrawn, by consent, without any proceedings under it, it is inoperative, and gives no right of preference to the *United States*. *ib*.
3. A consignment of goods by a debtor abroad, though insolvent, with directions to have them sold, and the proceeds paid to his creditors in *New-York*, is not such an assignment as will entitle the *United States* to a preference. *ib*.

V.

VAN SCHAICK'S PATENT

See KAYADEROSSERAS PATENT.

VENDOR AND VENDEE.

1. An entry made by the vendor of goods, in his book of sales, of the name of the purchaser, and the terms of the contract, which was read to the agent of the vendee, who made the purchase, and was assented to by him, as correct, was held not to be a sufficient memorandum in writing within the statute

- of frauds. *Bailey and Bogert v. Ogden*, 399
2. Whether the vendor is bound by such a memorandum, so that the vendee could enforce the contract against him. *Quere.* *ib.*
 3. An agreement with the vendor about the storage of the goods, and the delivery by him of the *export-entry* to the vendee, were held not to amount to a constructive delivery of the goods. *ib.*
 4. Where the vendor of goods on a credit, required notes of the vendee with approved endorsers, which was agreed to by the agent of the vendee, as one of the terms of sale, *it seems*, that the contract of sale is not complete, until the vendee or principal has assented to the giving of endorsed notes, and the endorsers have been named and approved. *ib.*
 5. Whether an agent, who is authorized to purchase goods at a certain price, upon a certain credit, can stipulate, so as to bind his principal, to give endorsed notes as security. *Quere.* *ib.*

VENIRE DE NOVO

See PRACTICE, 42.

VENUE.

In an action for a libel, if the defendant swears that the libel was published in a different county from that in which the venue is laid, and that he has a number of material witnesses residing in such county, the

venue will be changed. *Nicholson v. Lothrop*, 139

VERDICT



PRACTICE, 30. NEW TRIAL.

W.

WAGES.

See SEAMEN.

WARRANTY.

See PARTNERSHIP, 2

WILL.

See DEVISE. EVIDENCE, 7.

WITNESS.

1. No action will lie against a witness, who swears falsely in a cause, whereby judgment is given against a party, at the suit of the plaintiff, for the damages he has sustained by reason of such judgment. *Smith v. Lewis*, 157
2. An agent or broker, authorized to purchase goods on certain terms, is a competent witness in a suit between the vendor and vendee, though he has exceeded his authority. *Bailey and Bogert v. Ogden*, 399



1

1



